DOCKET

No. 07-608

Title:	United States, Petitioner v. Randy Edward Hayes
Docketed:	November 7, 2007
Lower Ct:	United States Court of Appeals for the Fourth Circuit
Case Nos.:	(06-4087)
Decision Date:	April 16, 2007
Rehearing Denied:	July 20, 2007

Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Oct 8 2007	Application (07A301) to extend the time to file a petition for a writ of certiorari from October 18, 2007 to November 17, 2007, submitted to The Chief Justice.
Oct 9 2007	Application (07A301) granted by The Chief Justice extending the time to file until November 7, 2007.
Nov 7 2007	Petition for a writ of certiorari filed. (Response due December 7, 2007)
Nov 28 2007	Order extending time to file response to petition to and including January 7, 2008.
Jan 7 2008	Order further extending time to file response to petition to and including February 19, 2008.
Feb 19 2008	Brief of respondent Randy Edward Hayes in opposition filed.
Mar 5 2008	DISTRIBUTED for Conference of March 21, 2008.
Mar 12 2008	Reply of petitioner United States filed. (Distributed)
Mar 24 2008	Petition GRANTED.
Apr 29 2008	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including June 9, 2008.
Jun 9 2008	Brief of petitioner United States filed.
Jun 9 2008	Joint appendix filed. (Statement of costs received.)
Jun 16 2008	Brief amici curiae of Professors of Linguistics and Cognitive Science filed.
Jun 16 2008	Brief amici curiae of Senators Frank R. Lautenberg, Dianne Feinstein, and Patty Murray filed.
Jun 16 2008	Brief amici curiae of Brady Center to Prevent Gun Violence, et al. filed.
Jun 16 2008	Brief amici curiae of National Network to End Domestic Violence, et al. filed.
Jun 30 2008	The time to file respondent's brief on the merits is extended to and including August 25, 2008.
Aug 8 2008	CIRCULATED.

Aug 13 2008	Record received from the U.S.C.A. for the 4th Circuit. (1 envelope) There are sealed documents in this record.
Aug 14 2008	Record received from U.S.D.C. for the Northern District of West Virginia (Clarksburg).
Aug 18 2008	SET FOR ARGUMENT ON Monday, November 10, 2008
Aug 20 2008	The time within which to file respondent's brief on the merits is further extended to and including September 16, 2008.
Sep 15 2008	The time within which to file respondent's brief on the merits is further extended to and including September 19, 2008.
Sep 19 2008	Brief of respondent Randy Edward Hayes filed. (Distributed)
Sep 26 2008	Brief amicus curiae of Second Amendment Foundation, Inc. filed. (Distributed)
Sep 26 2008	Brief of Eagle Forum Education & Legal Defense Fund in opposition filed. (Distributed)
Sep 26 2008	Brief amicus curiae of Gun Owners Foundation filed. (Distributed)
Oct 20 2008	Reply of petitioner United States filed. (Distributed)
Nov 10 2008	Argued. For petitioner: Nicole A. Saharsky, Assistant to the Solicitor General, Department of Justice, Washington, D.C. For respondent: Troy N. Giatras, Charleston, W.Va.

PETITION FOR WRIT OF CERTIORARI

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Supreme Court, U.S.
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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

RANDY EDWARD HAYES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 922(g)(9) of Title 18, United States Code, makes it a crime for any person convicted of a "misdemeanor crime of domestic violence" to possess a firearm. The question presented is whether, to qualify as a "misdemeanor crime of domestic violence" under 18 U.S.C. 921(a)(33)(A), an offense must have as an element a domestic relationship between the offender and the victim.

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In the Supreme Court of the United States

No.

UNITED STATES OF AMERICA, PETITIONER

v.

RANDY EDWARD HAYES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-32a) is reported at 482 F.3d 749. The order of the district court denying respondent's motion to dismiss the indictment (App., *infra*, 33a-39a) is reported at 377 F. Supp. 2d 540.

JURISDICTION

The judgment of the court of appeals was entered on April 16, 2007. A petition for rehearing was denied on July 20, 2007 (App., *infra*, 40a). On October 9, 2007, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including November 7, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant statutory provisions are reproduced in the appendix to this petition. App., *infra*, 41a-42a.

STATEMENT

Following a conditional guilty plea, respondent was convicted in the United States District Court for the Western District of West Virginia of possession of a firearm after having previously been convicted of a misdemeanor crime of domestic violence, in violation of 18 U.S.C. 922(g)(9) and 924(a)(2). He was sentenced to five years of probation, including six months of home detention with electronic monitoring. The court of appeals reversed, holding that the indictment must be dismissed because it failed to allege that respondent's state misdemeanor battery conviction was based on an offense that has, as an element, a domestic relationship between the offender and the victim. App., *infra*, 1a-32a.

1. Under 18 U.S.C. 922(g)(9), it is "unlawful" for any person "who has been convicted in any court of a misdemeanor crime of domestic violence * * * [to] possess in or affecting commerce, any firearm or ammunition."

Section 921(a)(33)(A) defines "misdemeanor crime of domestic violence" as:

> an offense that—
>
> (i) is a misdemeanor under Federal, State or Tribal law; and
>
> (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

18 U.S.C. 921(a)(33)(A) (2000 & Supp. V 2005). A person who knowingly violates that provision may be fined, imprisoned for not more than ten years, or both. 18 U.S.C. 924(a)(2).

2. In 1994, respondent pleaded guilty in the magistrate court of Marion County, West Virginia, to battery in violation of W. Va. Code § 61-2-9(c). That statute provides: "If any person unlawfully and intentionally makes physical contact of an insulting or provoking nature with the person of another or unlawfully and intentionally causes physical harm to another person, he shall be guilty of a misdemeanor." *Ibid.* The victim named in the criminal complaint was, at the time of the offense, respondent's wife, with whom respondent lived and with whom he had a child in common. App., *infra*, 2a; 7/5/05 Plea Hr'g Tr. 30-31. Respondent was sentenced to one year of probation. App., *infra*, 2a.

3. In 2004, law enforcement officials in Marion County, West Virginia, were summoned to respondent's home in response to a domestic violence 911 call. Respondent consented to a search. The search revealed a Winchester rifle belonging to respondent. A subsequent investigation showed that respondent had possessed at least four other rifles following his 1994 state battery conviction. App., *infra*, 2a & n.2; 7/5/05 Plea Hr'g Tr. 28-29.

Respondent was indicted on three counts of possessing firearms after being convicted of a misdemeanor crime of domestic violence, in violation of 18 U.S.C. 922(g)(9) and 924(a)(2). After respondent filed a motion to dismiss the indictment, the grand jury returned a superseding indictment that alleged that respondent's 1994 state battery conviction qualified as a misdemeanor crime of domestic violence because it was a misdemeanor offense; the offense had, as an element, the use and attempted use of physical force; and the victim was respondent's wife, who cohabited with respondent and with whom he had a child in common. App., *infra*, 2a-3a.

Respondent's motion to dismiss the superseding indictment argued that his 1994 state battery conviction was not a misdemeanor crime of domestic violence within the meaning of 18 U.S.C. 921(a)(33)(A), because W. Va. Code § 61-2-9(c) does not have, as an element, the existence of a domestic relationship between the offender and the victim. The district court denied the motion, relying on the Fourth Circuit's unpublished decision in *United States* v. *Ball*, 7 Fed. Appx. 210, cert. denied, 534 U.S. 900 (2001). App., *infra*, 33a-39a. In *Ball*, the court held that Section 921(a)(33)(A) requires only that the predicate offense have as an element the

use or attempted use of force; a domestic relationship need not appear in the formal definition of the offense if the evidence shows that there was in fact a domestic relationship between the offender and victim. 7 Fed. Appx. at 213.

Pursuant to Rule 11(a)(2) of the Federal Rules of Criminal Procedure, respondent entered a conditional plea of guilty to one count of possessing a firearm after having been convicted of a misdemeanor crime of domestic violence, in violation of 18 U.S.C. 922(g)(9). Respondent reserved the right to appeal the denial of his motion to dismiss the indictment on the ground that his 1994 state battery conviction was not a misdemeanor crime of domestic violence under federal law. App., *infra*, 3a-4a.

4. On direct appeal, a divided panel of the court of appeals reversed. App., *infra*, 1a-32a. The court acknowledged that "several of our sister circuits have ruled that the predicate offense need not, in order to be a [misdemeanor crime of domestic violence], contain a domestic relationship element." *Id.* at 22a n.12. The court also acknowledged that the Fourth Circuit had previously reached the same conclusion in its unpublished decision in *Ball*. *Id.* at 5a n.7. But the court ruled, in conflict with these decisions, that 18 U.S.C. 921(a)(33)(A) requires that a predicate offense have, as an element, "commi[ssion] by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the

victim," 18 U.S.C. 921(a)(33)(A)(ii). The court reasoned that, because the "committed by" phrase appears in the second clause of the definition, and immediately follows the phrase, "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon," the "committed by" phrase does not modify the noun "offense," but rather the phrase beginning "has, as an element." App., *infra*, 5a-10a. Therefore, the court concluded, a domestic relationship constitutes a required element of the predicate misdemeanor offense. *Id.* at 5a. The court rejected arguments based on the grammar and legislative history of Section 921(a)(33)(A), and it resolved any doubts about the meaning of the statute by reliance on the rule of lenity. *Id.* at 10a-23a.

Judge Williams dissented. App., *infra*, 23a-32a. In her view, the language of the statute, "read in its natural and obvious sense, * * * unambiguously requires that only that the mode of aggression, and not the relationship status between the perpetrator and the victim, be included in the formal definition of the predicate misdemeanor offense." *Id.* at 26a. Judge Williams found it "significant" that Congress had used the word "element" in the singular, reasoning that, had Congress intended to make both the use of force and a domestic relationship required elements of the predicate offense, it would have used the word "elements," in the plural. *Ibid.*

The dissent also noted that the majority's interpretation is inconsistent with the statute's purpose and history. When 18 U.S.C. 922(g)(9) was enacted in 1996, Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 658(b), 110 Stat. 3009-372, most States prosecuted domestic violence offenders under their general assault statutes, and fewer than half the States had enacted misdemeanor assault statutes containing a do-

mestic-relationship element. App., *infra*, 27a-28a. The dissent considered it "unlikely" that Congress would "enact[] legislation that would immediately become a dead letter in a majority of the states." *Id.* at 28a. The dissent also observed that the drafting history of the legislation and contemporaneous statements of its sponsor supported the conclusion that the prohibition on gun possession applies to persons "convict[ed] for domestic violence-related crimes * * * that are not explicitly identified as related to domestic violence." *Id.* at 29a (quoting 142 Cong. Rec. 26,675 (1996) (statement of Sen. Lautenberg)).

REASONS FOR GRANTING THE PETITION

The court of appeals in this case concluded that, under 18 U.S.C. 922(g)(9), persons who are convicted of misdemeanor crimes of violence against their spouses or children are barred from possessing a firearm only if they were convicted under a statute that includes the domestic relationship between perpetrator and victim in the formal definition of the offense. If the offender was convicted in a jurisdiction that had no such statute, or if state authorities chose for other reasons to prosecute the crime as, or accept a guilty plea for, simple battery, assault, or a similar offense, then, according to the court of appeals, the federal prohibition on firearm possession has no application.

The court of appeals' interpretation of the statute conflicts with the decisions of all nine other courts of appeals that have addressed this issue. The decision is incorrect, and, if left unreviewed, it will substantially impede enforcement of 18 U.S.C. 922(g)(9). This Court's review is therefore warranted.

A. The Decision Below Conflicts With The Decisions Of Nine Other Courts Of Appeals

In ruling that a misdemeanor crime of domestic violence that disqualifies a person from possessing firearms under 18 U.S.C. 922(g)(9) must have, as an element, a domestic relationship between offender and victim, the court of appeals acknowledged that its decision conflicts with the decisions of other circuits, and that it is "in the minority" on this issue. App., *infra*, 22a n.12. Specifically, all nine other courts of appeals to address the question have rejected the interpretation that the court below adopted. See *United States* v. *Heckenliable*, 446 F.3d 1048, 1049 (10th Cir.), cert. denied, 127 S. Ct. 287 (2006); *United States* v. *Belless*, 338 F.3d 1063, 1067 (9th Cir. 2003); *White* v. *Department of Justice*, 328 F.3d 1361, 1364-1367 (Fed. Cir. 2003); *United States* v. *Shelton*, 325 F.3d 553, 561-562 (5th Cir.), cert. denied, 540 U.S. 916 (2003); *United States* v. *Kavoukian*, 315 F.3d 139, 142-144 (2d Cir. 2002); *United States* v. *Barnes*, 295 F.3d 1354, 1358-1361 (D.C. Cir. 2002); *United States* v. *Chavez*, 204 F.3d 1305, 1313-1314 (11th Cir. 2000); *United States* v. *Meade*, 175 F.3d 215, 218-221 (1st Cir. 1999); *United States* v. *Smith*, 171 F.3d 617, 619-621 (8th Cir. 1999). As Judge Williams noted in her dissent, the Fourth Circuit is not "*in* the minority on this issue"; the Fourth Circuit *is* the minority. App., *infra*, 23a.

Because the Fourth Circuit denied the government's petition for rehearing en banc in this case, there is little prospect that the Fourth Circuit will alter its position. The division in authority is enduring, and it is unlikely to be resolved without this Court's intervention. It is also of practical significance because it means that a convicted individual's ability to possess firearms consis-

tent with federal law will depend on the State in which he resides. If, for example, respondent were to move from West Virginia to Georgia, the same battery conviction held insufficient in the Fourth Circuit would trigger the firearms prohibition in the Eleventh Circuit. The national prohibition on firearms possession by prohibited persons should not operate in such a patchwork and haphazard manner.

B. The Decision Below Incorrectly Constricts The Scope Of 18 U.S.C. 922(g)(9)

The decision below not only stands alone among court of appeals decisions addressing the question presented, it is also incorrect. The text, purpose, and history of the statute all support the majority rule: Although the government in a 18 U.S.C. 922(g)(9) prosecution must establish, as a matter of fact, that the defendant had a domestic relationship with the victim of the predicate offense, nothing in the statute requires the government to establish that a domestic relationship was included in the formal definition of the predicate offense.

1. Section 922(g)(9) extends the federal prohibition on firearm possession by felons, 18 U.S.C. 922(g)(1), and persons subject to domestic restraining orders, 18 U.S.C. 922(g)(8), to persons convicted of "misdemeanor crime[s] of domestic violence." Congress defined the term "misdemeanor crime of domestic violence" to mean an offense that is a misdemeanor under state, federal, or tribal law;[1] and that "has, as an element, the use or at-

[1] The inclusion of misdemeanors under tribal law was added by the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 908(a), 119 Stat. 3083.

tempted use of physical force, or the threatened use of a deadly weapon, committed by" a person with a specified domestic relationship with the victim. 18 U.S.C. 921(a)(33)(A).

As a number of courts of appeals have correctly concluded, Congress's use of the singular noun "element" preceding the physical-force language indicates that Congress required only one element: the use or attempted use of force. Given the conceptional distinction between the mode of aggression (*e.g.*, the use of physical force) and the relationship between aggressor and victim (*e.g.*, current or former spouse), the statute is not naturally read to mean that those two ideas must have been subsumed within a single "element." See *Heckenliable*, 446 F.3d at 1050-1051; *Belless*, 338 F.3d at 1066; *Barnes*, 295 F.3d at 1362-1364; *Meade*, 175 F.3d at 218-219; *Smith*, 171 F.3d at 620. When Congress has sought to identify offenses with more than one distinct, unrelated attribute, it has used the word "elements," in the plural. See *Barnes*, 295 F.3d at 1363.

Moreover, under the most logical reading of the statutory definition, the phrase "committed by" a person with a domestic relationship to the victim modifies the earlier reference to the defendant's criminal offense; it does not modify the "use of force" element. A person does not "commit" an "element" or a "use of force." A person does, however, "commit" a criminal offense. See *Oxford English Dictionary* 559 (2d ed. 1989) (defining "commit" as "[to] do (something wrong or reprehensible), to perpetrate, be guilty of (a crime or offence, etc.)"); *Webster's Third New International Dictionary* 457 (1993) (defining "commit" as "do, perform," and giving as an example, "convicted of *committing* crimes against the state"); *Webster's New International Dic-*

tionary of the English Language 539 (2d ed. 1958) (defining "commit" as "[t]o do; perpetrate, as a crime, sin, fault, folly, or error"); *Random House Dictionary of the English Language* 412 (2d ed. 1987) (defining "commit" as "to do; perform; perpetrate," and giving as examples, "*to commit murder; to commit an error*"); *American Heritage Dictionary* 381 (3d ed. 1992) (defining "commit" as "[t]o do, perform, or perpetrate," and giving as an example, "*commit a murder*"); see also *Barnes*, 295 F.3d at 1360-1361. Interpreting the language of the statute according to its ordinary meaning, a "misdemeanor crime of domestic violence" is an offense that is a misdemeanor; that has, as an element, the use of force; and that was committed by a person having a domestic relationship with the victim.

2. In reaching its contrary conclusion, the court of appeals focused on three features of the statutory definition of "misdemeanor crime of domestic violence." None of these features, standing separately or together, provides sufficient reason to disregard the ordinary meaning of the words Congress used to define the scope of the federal prohibition on firearm possession for persons convicted of misdemeanor crimes of domestic violence.

First, the court of appeals relied on the punctuation of the statute's definitional provision. App., *infra*, 7a-9a. The court concluded that, because Congress placed a semicolon at the end of clause (i) of Section 921(a)(33)(A), but failed to place a corresponding semicolon between the "has, as an element" phrase and the "committed by" phrase in clause (ii), Congress meant to treat "commiss[ion] by" a person with a domestic relationship with the victim as an element of the predicate offense. *Ibid.* Such reliance on Congress's deployment of semicolons is misplaced. See *United States Nat'l*

Bank v. *Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 454 (1993) ("[A] purported plain-meaning analysis based only on punctuation is necessarily incomplete and runs the risk of distorting a statute's true meaning."). Although punctuation is useful when it confirms conclusions drawn from the words of the statute, courts may disregard punctuation to give effect to the statute's purpose and meaning. See, *e.g.*, *Barrett* v. *Van Pelt*, 268 U.S. 85, 91 (1925).

Second, the court of appeals relied on the fact that the "committed by" language was included in clause (ii) rather than placed in a separate clause. App., *infra*, 9a (noting that, had the phrase been placed in a separate clause, "we might very well accept the Government's contention"). But while Congress might have made its intent more clear by inserting a (iii) or a "hard return" before "committed by," the possibility that Congress could have made its manifest intent even more clear, is no excuse for refusing to give meaning to the words that Congress did employ.

Finally, the court of appeals invoked the "rule of the last antecedent," according to which a limiting clause or phrase is "ordinarily * * * read as modifying only the noun or phrase that it immediately follows." App., *infra*, 9a (citing *Barnhart* v. *Thomas*, 540 U.S. 20, 26 (2003)). Applying this rule, the court of appeals concluded that, because the "committed by" phrase immediately follows the"use of force" phrase, both phrases must define elements of the offense. *Id.* at 9a-13a. But a literal application of the last antecedent rule would require that both the use of force and the domestic relationship be part of a single element, which makes almost no sense. More-

over, as this Court has observed, the rule of the last antecedent, while sensible as a grammatical matter, it is "not an absolute and can assuredly be overcome by other indicia of meaning." *Thomas*, 540 U.S. at 26.

In this case, the court of appeals' focus on semicolons, its reliance on the absence of a separate subdivision, and its employment of the rule of the last antecedent, result in an interpretation of the statute that is contrary to both Congress's customary usage of the singular noun "element," and the ordinary usage of the verb "commit." The features of the statute on which the court of appeals focused cannot overcome the plain meaning of the words Congress used to define a predicate misdemeanor under 18 U.S.C. 922(g)(9).

3. The interpretation of the statute adopted by the court of appeals would also, as a number of other courts have noted, render the law inapplicable to much of the country's domestic violence-related misdemeanor convictions upon its passage. See *Heckenliable*, 446 F.3d at 1051-1052; *Barnes*, 295 F.3d at 1364-1365; *Meade*, 175 F.3d at 218-221. When 18 U.S.C. 922(g)(9) was enacted in 1996, no more than 17 states and Puerto Rico had enacted domestic-violence misdemeanor laws that included domestic-relationship status as an element of the offense. See *Barnes*, 295 F.3d at 1364 n.12. It is unlikely that Congress would have enacted a statute that would immediately be a dead letter with respect to more than half of the States' misdemeanor laws.

Moreover, because no federal misdemeanor has as its elements the use of force against a spouse, child, or other person similarly situated, the court of appeals' decision would largely render meaningless the statute's inclusion of offenses that are "misdemeanor[s] under

Federal * * * law."[2] 18 U.S.C. 921(a)(33)(A)(i); see *Barnes*, 295 F.3d at 1364-1365; cf. *Chavez*, 204 F.3d 1305, 1313-1314 (concluding that 18 U.S.C. 922(g)(9) applies to a person convicted of misdemeanor violation of 18 U.S.C. 113(a)(4), assault by striking, beating or wounding within the maritime and territorial jurisdiction of the United States, for assaulting his wife on a military base).

While failing to acknowledge that its construction of the statute would render 18 U.S.C. 922(g)(9) a nullity with respect to much of the country's domestic violence-related misdemeanor convictions upon its passage, the court of appeals found "more than a thread of wisdom" in requiring that the predicate offense have a domestic-relationship element, since such a requirement would avoid an evidentiary debate at trial over whether the defendant had a domestic relationship with the victim. App., *infra*, 20a n.11. But in many cases, including this one, no one can reasonably dispute that the defendant had a domestic relationship with the victim. See *ibid.*; see also, *e.g.*, *Shelton*, 325 F.3d at 556; *Barnes*, 295 F.3d at 1359. Moreover, Congress did not consider an inquiry into the existence of a domestic relationship as imposing an unreasonable burden in the analogous context of restraining orders. See 18 U.S.C. 922(g)(8). More fundamentally, as the First Circuit noted in *Meade*, "[f]ederal criminal trials typically involve proof and differential factfinding, and the issue of relationship status is by no

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[2] State domestic-violence offenses occurring within the special maritime and territorial jurisdiction of the United States could be prosecuted under 18 U.S.C. 13. But no distinctly federal misdemeanor offense would qualify.

means outside a jury's competence." 175 F.3d at 222 n.1. And nothing suggests that Congress regarded whatever practical difficulties may be associated with assembling documentary and testimonial proof of a domestic relationship as more significant than providing a nationwide solution to the problem it had in mind: the possession of firearms by those convicted of violent misdemeanors in a domestic context.

4. The legislative history of Section 922(g)(9) provides further support for the majority rule. The bill originally introduced in the Senate defined a predicate offense as a "crime of violence * * * committed by" a person with a domestic relationship with the victim. S. 1632, 104th Cong., 2d Sess. 1 (1996); see 142 Cong. Rec. at 5840.[3] The phrase "has, as an element, the use

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[3] As part of the Omnibus Consolidated Appropriations Act, 1997, Congress also enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, which included a provision making commission of a "crime of domestic violence" a basis for deportation, Pub. L. No. 104-208, Div. C, Tit. III, § 350(a), 110 Stat. 3009-639 (8 U.S.C. 1227(a)(2)(E)). That provision, like the original draft of Senate Bill 1632, defines the term "crime of domestic violence" as a "crime of violence" that is "committed by" a person with a specified domestic relationship with the victim. The statute reads:

> [T]he term "crime of domestic violence" means any crime of violence (as defined in section 16 of Title 18) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the

or attempted use of physical force, or the threatened use of a deadly weapon" was substituted for the phrase "crime of violence" shortly before the provision was enacted into law. Senator Lautenberg, the sponsor of the legislation, explained that the substitution was designed to respond to concerns that the term "crime of violence" was "too broad, and could be interpreted to include an act such as cutting up a credit card with a pair of scissors." *Id.* at 26,675.

Senator Lautenberg's remarks also made clear that the addition of the physical-force phrase was not designed to alter the effect of the statute's domestic-relationship language. Noting that federal law requires law enforcement officials to make a "reasonable effort" to ensure that persons seeking to purchase handguns are not prohibited from doing so under federal law, see 18 U.S.C. 922(s)(2), Senator Lautenberg stated:

> [C]onvictions for domestic violence-related crimes often are for crimes, such as assault, that are not explicitly identified as related to domestic violence. Therefore, it will not always be possible for law enforcement authorities to determine from the face of someone's criminal record whether a particular misdemeanor conviction involves domestic violence, as defined in the new law.
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> * * * * *
>
> In my view, the reasonable effort requirement should not be interpreted * * * so narrowly that it would allow law enforcement agencies to routinely

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United States or any State, Indian tribal government, or unit of local government.

18 U.S.C. 1227(a)(2)(E)(i).

> ignore misdemeanor convictions for violent crimes, without further exploration into whether these crimes involved domestic violence.

142 Cong. Rec. at 26,675-26,676. Senator Lautenberg's remarks indicate Congress's awareness that domestic-violence offenses were generally prosecuted under state laws that do not contain a domestic-relationship element. The remarks also indicate that Senator Lautenberg, as the sponsor of the legislation and the author of its operative language, intended for the firearm prohibition to apply without regard to whether an offender's domestic-violence misdemeanor was prosecuted under a statute specifically targeting domestic violence. See, *e.g.*, *Barnes*, 295 F.3d at 1365; *Kavoukian*, 315 F.3d at 143-144. While the court of appeals noted that those remarks are "not controlling," App., *infra*, 19a (citing *CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980)), they are nonetheless highly relevant.

5. Because the text, background, and purpose of Section 921(a)(33)(A) demonstrate that the statute unambiguously reaches misdemeanor convictions that have, as an element, the use of force, when the government can prove the required domestic relationship, the court of appeals' invocation of the rule of lenity is unwarranted. See App., *infra*, 20a-22a. Contrary to the court of appeals' view, "[t]he simple existence of some statutory ambiguity * * * is not sufficient to warrant application of that rule." *Muscarello* v. *United States*, 524 U.S. 125, 138 (1998). Rather, the rule applies only if there is a "grievous ambiguity" in the statutory text such that, "after seizing everything from which aid can be derived," the Court "can make no more than a guess as to what Congress intended." *Id.* at 138-139. Because it is clear that Congress intended that a predicate mis-

demeanor would qualify when it has, as an element, the use of force, and it can be proved that the offense was committed by a person having a domestic relationship with the victim, the rule of lenity has no role to play in this case.

C. The Question Presented Is Of Recurring Importance

Review is also warranted because, as the volume of reported decisions on the issue indicates, the question is one of recurring importance in federal prosecutions. If left unreviewed, the court of appeals' decision will substantially impede enforcement of Section 922(g)(9). A large number of acts of domestic violence are either charged as misdemeanor battery, assault, or other similar offenses, or charged as felonies but resolved through plea bargaining that results in a misdemeanor battery or assault conviction. Congress's objective of taking guns out of the hands of persons convicted of these crimes would be frustrated in significant measure if the government were deprived of the opportunity to prove, beyond a reasonable doubt, that the defendant's conviction arose from domestic violence, even if the misdemeanor statute of conviction did not require proof of that fact.

The question presented is also relevant to administration of the Brady Handgun Violence Prevention Act, 18 U.S.C. 922(s)-(t) (2000 & Supp. V 2005), which requires federal officials to maintain a national system of records to determine whether a potential firearm buyer or recipient is disqualified under federal law from possessing a firearm. The division of authority created by the decision below will create substantial practical burdens in the administration of the federal background-check system. Federal officials reviewing the lawfulness of certain firearms purchases by out-of-state buyers

with possible misdemeanor convictions of domestic violence will now have to consider not only whether the transaction complies with the law of the State in which the transaction occurs, but also whether buyers are permitted to possess firearms under the interpretation of Section 921(a)(33)(A) prevailing in their State of residence—an interpretation that may or may not be consistent with the interpretation prevailing in the State in which the transaction occurs. See 18 U.S.C. 922(a)(3) and (b)(3).

In her dissent, Judge Williams noted that four of the five States within the Fourth Circuit's jurisdiction, including West Virginia, have now enacted misdemeanor domestic-violence statutes that contain domestic-relationship elements, and that the only Fourth Circuit State that has not done so is Maryland. See App., *infra*, 28a n.3. These statutes do not, however, diminish the effect of the court of appeals' decision, either with respect to convictions predating their enactment, or with respect to post-enactment convictions. Even in States that have enacted misdemeanor domestic-violence statutes, prosecutors may nonetheless choose to charge or accept guilty pleas from domestic-violence offenders under laws that contain fewer elements. And defendants with convictions entered in any of the 50 States may choose to reside, and possess firearms in, States within the Fourth Circuit's jurisdiction. The decision below is also likely to prove a source of confusion for defendants whose possession of firearms cannot be prosecuted when they live in the jurisdiction of the Fourth Circuit but who later move to a State where their conduct can be prosecuted under federal law.

Accordingly, the court of appeals' decision, if left unreviewed, will result in the inconsistent application of

a firearms prohibition intended to apply uniformly nationwide. This Court's intervention is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 2007

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 06-4087

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

RANDY EDWARD HAYES, DEFENDANT-APPELLANT

Argued: Oct. 27, 2006
Decided: April 16, 2007

Before: WILLIAMS, MICHAEL, and KING, Circuit Judges.

Reversed and remanded by published opinion. Judge KING wrote the majority opinion, in which Judge MICHAEL joined. Judge WILLIAMS wrote a dissenting opinion.

KING, Circuit Judge.

Randy Edward Hayes appeals from the district court's denial of his motion to dismiss an indictment charging him with three counts of possessing firearms after having been convicted of the predicate offense of a "misdemeanor crime of domestic violence" (an "MCDV"), in violation of 18 U.S.C. §§ 922(g)(9) and 924(a)(2). *See United States v. Hayes*, No. 1:05cr03 (N.D. W. Va. June 24, 2005) (the "Order").[1] Hayes was

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[1] The Order is found at J.A. 108-15. (Citations herein to "J.A.—" refer to the contents of the Joint Appendix filed by the parties in this appeal.)

convicted in the Northern District of West Virginia after he entered a conditional guilty plea to one of the indictment's three counts. He maintains on appeal that his predicate offense was not an MCDV as that term is defined in 18 U.S.C. § 921(a)(33)(A) (the "MCDV Definition"), and that the charges in the indictment thus fail as a matter of law. As explained below, we agree with Hayes and reverse.

I.

In 1994, Hayes pleaded guilty to a misdemeanor battery offense under West Virginia law, in the magistrate court of Marion County, West Virginia (the "1994 State Offense"). The victim of the 1994 State Offense was Hayes's then wife, Mary Ann (now Mary Carnes), with whom he lived and had a child. As a result of the 1994 State Offense, Hayes was sentenced to a year of probation.

Ten years later, on July 25, 2004, the authorities in Marion County were summoned to Hayes's home in response to a domestic violence 911 call. When police officers arrived at Hayes's home, he consented to a search thereof, and a Winchester rifle was discovered. Hayes was arrested and, on January 4, 2005, indicted in federal court on three charges of possessing firearms after having been convicted of an MCDV, in violation of 18 U.S.C. §§ 922(g)(9) and 924(a)(2).[2] Hayes filed a motion challenging the validity of the indictment and, on May 4, 2005, the grand jury returned a superseding indictment

[2] The Winchester rifle found in Hayes's home was the subject of Count Three of the indictment. Hayes had sold a Marlin rifle in January or February 2004, and it was the subject of Count One of the indictment. Three additional rifles were the underpinnings of Count Two of the indictment.

against him. The superseding indictment included the same three charges contained in the initial indictment, plus a "Notice of Additional Factors," alleging that Hayes had been convicted in West Virginia state court in 1994 on a misdemeanor battery offense that satisfied the definition of an MCDV.[3]

Hayes sought dismissal of the superseding indictment, maintaining that it was legally flawed because his 1994 State Offense was not an MCDV under federal law. On June 11, 2005, the district court, by a bench ruling, denied Hayes's motion to dismiss. On July 5, 2005, Hayes entered a conditional guilty plea to Count One of the superseding indictment,[4] pursuant to Rule 11(a)(2)

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[3] The Notice of Additional Factors in the superseding indictment alleged, in relevant part:

> Defendant Randy Edward Hayes' February 24, 1994 Battery conviction, as referenced in . . . this Superseding Indictment, constituted [an MCDV] because: (a) Battery is a misdemeanor under State law in West Virginia; (b) Battery has, as an element, the use and attempted use of physical force; (c) Defendant Randy Edward Hayes committed the offense of Battery against the victim: (i) who was his current spouse; and (ii) who was a person with whom he shared a child in common; and (iii) who was cohabiting with and had cohabited with him as a spouse.

J.A. 19.

[4] Count One of the superseding indictment, on which Hayes pleaded guilty, alleged in pertinent part as follows:

> On or about January or February 2004, [in] Marion County, West Virginia, . . . Randy Edward Hayes, having been convicted in a court of [an MCDV], that is to say, on or about February 24, 1994, [he] was convicted in the Magistrate Court of Marion County of Battery; did knowingly possess in and affecting interstate commerce a firearm. . . .

J.A. 16.

of the Federal Rules of Criminal Procedure, thus reserving his right to appeal the denial of his motion to dismiss.[5] Hayes thereafter filed a timely notice of appeal, and we possess jurisdiction pursuant to 28 U.S.C. § 1291.

II.

We are presented in this appeal with a pure question of statutory interpretation: whether the MCDV Definition set forth in § 921(a)(33)(A) requires that the predicate offense underlying a § 922(g)(9) conviction have as an element a domestic relationship between the offender and the victim. We review de novo the district court's ruling on this question of law. *See United States v. Segers*, 271 F.3d 181, 183 (4th Cir. 2001).

III.

A.

Hayes maintains on appeal that the district court erred in denying his motion to dismiss the superseding indictment, in that his 1994 State Offense did not have as an element a domestic relationship, and it was thus not an MCDV. Pursuant to § 922(g)(9) of Title 18, under which Hayes was convicted, it is unlawful for any person who has been "convicted in any court of [an MCDV]" to possess a firearm. 18 U.S.C. § 922(g)(9) (the "Possession Statute"). The 1994 State Offense on which Hayes was convicted was that of simple battery, in violation of

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[5] Rule 11(a)(2) of the Federal Rules of Criminal Procedure provides that "[w]ith the consent of the court and the government, a defendant may enter a conditional plea of guilty . . . , reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea."

West Virginia Code section 61-2-9(c) (the "WV Statute").[6] Importantly, the WV Statute does not have as an element a domestic relationship between the offender and his victim. *See* W. Va. Code § 61-2-9.

In resolving this appeal, we must determine whether the MCDV Definition in § 921(a)(33)(A) requires that an MCDV have as an element a domestic relationship between the offender and the victim. The district court rejected Hayes's contention on this point, relying primarily on our unpublished decision in *United States v. Ball*, 7 Fed. Appx. 210 (4th Cir. 2001).[7] In *Ball*, we deemed the MCDV Definition to require a predicate offense to have only "one element—the use or attempted use of physical force; the relationship between the perpetrator and victim need not appear in the formal definition of the predicate offense." *Id.* at 213. As explained below, however, the MCDV Definition plainly provides, in its clause (ii), that the predicate offense must have as an element one of certain specified domestic relationships between the offender and the victim.

The statutory reading we adopt with respect to the MCDV Definition is compelled for multiple reasons. First of all, the text and structure of the MCDV Definition plainly require that a predicate offense have as an

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[6] The WV Statute provides that "[i]f any person unlawfully and intentionally makes physical contact of an insulting or provoking nature with the person of another or unlawfully and intentionally causes physical harm to another person, he shall be guilty of a misdemeanor." W. Va. Code § 61-2-9(c).

[7] *Ball* is not controlling precedent in this case. *See* 4th Cir. R. 32.1 (citations to unpublished decisions issued prior to January 1, 2007, are disfavored). In any event, we are convinced, on the basis of the position explained herein, that *Ball* was not correctly decided.

element one of the specified domestic relationships between the offender and the victim. This reading is also supported by the rule of the last antecedent and is not inconsistent with Congress's use of the singular term "element" in the MCDV Definition. Second, the statutory language of the MCDV Definition is not demonstrably at odds with the legislative intent underlying its adoption by Congress. Finally, even if the MCDV Definition could be deemed ambiguous, the rule of lenity mandates that any such ambiguity be resolved in Hayes's favor. Because the WV Statute has no domestic relationship element, and because such an underpinning is essential to the existence of an MCDV, Hayes's motion to dismiss the superseding indictment should have been granted.

B.

1.

It is elementary, of course, that the starting point for an issue of statutory interpretation is the language of the statute itself. *See United States v. Abuagla*, 336 F.3d 277, 278 (4th Cir. 2003). In that regard, "[w]e must first determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute . . . [and] our inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent." *Id.* (internal quotation marks omitted). We assess whether statutory language is plain or ambiguous through our "reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). "The plain meaning of legislation should be conclusive, except in the rare cases [in which] the literal

application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *United States v. Ron Pair Enters., Inc.* 489 U.S. 235, 242 (1989) (internal quotation marks omitted).

In this situation, the MCDV Definition mandates that a predicate offense be a misdemeanor and have as an element the use of force committed by a person in a domestic relationship with the victim. *See* 18 U.S.C. § 921(a)(33)(A). More specifically, the MCDV Definition provides:

> (33)(A) Except as provided in subparagraph (C), the term "misdemeanor crime of domestic violence" means an offense that-
>
> > (i) is a misdemeanor under Federal or State law; and
> >
> > (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim[.]

Id. As is readily apparent, the MCDV Definition is structured as a statement of what is being defined, followed by a parallel list of two essential attributes. After identifying the term "misdemeanor crime of domestic violence" as the thing being defined, the MCDV Definition splits into two separate clauses. First, clause (i)

provides that an MCDV must be "a misdemeanor under Federal or State law." *Id.* § 921(a)(33)(A)(i). Next, clause (ii) of the MCDV Definition—the crux of the dispute here—provides that an MCDV must have "as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim." *Id.* § 921(a)(33)(A)(ii).

It is significant that a semicolon has been placed at the end of the MCDV Definition's clause (i), indicating that the attribute contained therein is to be separate and distinct from the attribute contained in clause (ii). *See United States v. Naftalin,* 441 U.S. 768, 774 n.5 (1979) (recognizing that punctuation is not always decisive, but finding significant "the use of separate numbers to introduce each subsection, and the fact that the phrase . . . was set off solely as part of [a separate] subsection"). Of even greater significance, there is no corresponding semicolon in the structure or text of clause (ii), and thus no indication that the second of the two attributes in the MCDV Definition somehow terminates before the words "committed by," or sets the "committed by" phrase apart from the "have, as an element" language, thereby creating a third statutory attribute. *See* 18 U.S.C. § 921(a)(33)(A). Rather, the structure of the MCDV Definition makes it clear that the "committed by" phrase is part of the second attribute, that is, clause (ii). *See* 73 Am. Jur. 2d *Statutes* § 143 ("[T]he collocation of the words and phrases in a statute is sometimes an aid in the construction therein, and should not be arbitrarily disregarded [unless] the intention of the legislature requires it to be disregarded.").

If Congress, in drafting the MCDV Definition, had seen fit to place the second half of clause (ii)—that is, the words "committed by a current or former spouse, parent, or guardian of the victim"—in a separate clause, we might very well accept the Government's contention. However, that is not the statutory provision we are called upon to assess. Here, the "committed by" phrase in clause (ii) was not set apart by Congress, and the MCDV Definition thus does not restrict the clause's "has, as an element" language to only the first half thereof, that is, the "use or attempted use of physical force, or the threatened use of a deadly weapon."

2.

As further support for our conclusion here, the reading explained above is compelled by the longstanding "grammatical rule of the last antecedent." *See Barnhart v. Thomas*, 540 U.S. 20, 26 (2003). As the Supreme Court recently explained, pursuant to that rule "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows." *See id.*; *see also* 73 Am. Jur. 2d *Statutes* § 138 ("Qualifying words, phrases, and clauses are ordinarily confined to the last antecedent, or the words and phrases immediately preceding."). The most important phrase of the MCDV Definition for our analysis, that is, the "committed by" phrase in the second half of clause (ii), must be read to modify its last antecedent, that is, the phrase in the first half of that clause, "use or attempted use of physical force, or the threatened use of a deadly weapon." That phrase—not the noun "offense"—is the language the "committed by" phrase immediately follows. *See* 18 U.S.C. § 921(a)(33)(A). Not only is the noun "offense" not the noun or phrase imme-

diately preceding the "committed by" phrase; the noun "offense" does not even appear in the same clause as the "committed by" phrase. *See id.* Instead, the noun "offense" appears at the beginning of subparagraph (A) of the MCDV Definition, and it is separated from the "committed by" phrase by both clause (i) and the first half of clause (ii). *See id.* Thus, under the grammatical rule of the last antecedent, the "committed by" phrase cannot be limited to modifying only the noun "offense."

In *United States v. Barnes*, the D.C. Circuit faced the issue we address today, and it did not find the rule of the last antecedent to be controlling. *See* 295 F.3d 1354, 1360 (D.C. Cir. 2002). It instead held that the MCDV Definition does not require that a predicate offense have as an element a domestic relationship between the offender and his victim, relying on its conclusion that the rule of the last antecedent is "not an inflexible rule, and is not applied where the context indicates otherwise." *See id.* (citing *United States v. Pritchett*, 470 F.2d 455, 459 (D.C. Cir. 1972)). After so concluding, the court observed that one does not commit a "use of force"; rather, one commits an "offense." *See id.* According to the *Barnes* majority, because offenses are committed, and the use of force is not, the second half of clause (ii), the "committed by" phrase, could modify the noun "offense," and does not necessarily modify the "use of force" phrase. *See id.*; *see also United States v. Belless*, 338 F.3d 1063, 1066 (9th Cir. 2003) ("[T]o read the 'committed by' phrase as modifying the phrase that immediately precedes it . . . would be grammatically unsound.").[8]

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[8] In *Barnes*, Judge Sentelle spelled out, in a well-reasoned dissent, the view of the MCDV Definition that we adopt today. *See* 295 F.3d at

The explanation relied on by the *Barnes* court is, to us, a grammatically labored and erroneous reading of the MCDV Definition. *See* 73 Am. Jur. 2d *Statutes* § 140 ("[S]tatutes are generally not to be construed by strict and critical adherence to technical grammatical rules."). We are not, in these circumstances, authorized to somehow disregard the rule of the last antecedent, which requires us to read the "committed by" phrase as modifying the "use of force" phrase.

We acknowledge, of course, that our Court has heretofore recognized that compliance with the rule of the last antecedent is not always necessary or appropriate. *See In re Witt*, 113 F.3d 508, 511 (4th Cir. 1997). In *Witt*, Judge Michael observed that a particular reading is not compelled by application of the rule of the last antecedent where it is "quite plausible as a matter of common sense" that a phrase could modify more than one term or phrase. *See id.*; *see* also 73 Am. Jur. 2d *Statutes* § 138 ("The rule [of the last antecedent] is not applicable where a further extension or inclusion is clearly required by the intent and meaning of the context, or disclosed by the entire act."). That is not the

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1368-70 (Sentelle, J., dissenting). In so doing, he relied on the plain language of the MCDV Definition to conclude that it requires a predicate offense to have as an element a domestic relationship. *See id.* at 1368-69. In addressing Congress's use of the singular rather than the plural of "element," Judge Sentelle deemed the distinction "largely meaningless," aptly observing that "the argument . . . is not how many elements are involved, but what the singular element is." *Id.* at 1369. He then concluded that the rule of lenity should also apply, and rejected the contention that the statute's legislative history evinces a clear congressional intent that precludes application thereof. *See id.* at 1369-70.

situation we face, however, and our conclusion on this point is not at all inconsistent with *Witt*.[9] As we have explained, it is entirely implausible for the "committed by" phrase of clause (ii) of the MCDV Definition to modify a noun ("offense") not even appearing in that clause, to the total exclusion of the phrase immediately preceding it. *Cf. United States v. Naftalin*, 441 U.S. 768, 774 n.5 (1979) (observing that placement of phrase in separate subsection indicates phrase was not intended to modify earlier subsections).

The difference between a reading that is compelled by the rule of the last antecedent, on the one hand, and one that is not so compelled, on the other, is readily illustrated in the context of the MCDV Definition. If the Government had contended, for instance, that the rule of the last antecedent required a reading that the "committed by" phrase modifies only the words "threatened use of a deadly weapon," and not the entire phrase "use or attempted use of physical force, or the threatened use of a deadly weapon," we would reject that contention. It

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[9] In *Witt*, a bankruptcy case, we were asked to interpret the statutory provision "the plan may provide for the *payment* of the *claim as modified pursuant to [the statute]*" to determine whether the phrase "as modified pursuant to [the statute]" described the noun "payment" or the noun "claim." *See* 113 F.3d at 510-11. We concluded, in favor of the creditor, that although the last antecedent was the noun "claim," the noun "payment" was the noun modified by the phrase "as modified pursuant to the statute." *See id.* at 512. In so ruling, we decided that the rule of the last antecedent was not controlling. *See id.* at 511. First, the noun "claim" was part of the prepositional phrase "of the claim," which modified the noun "payment." *See id.* Second, the rule of the last antecedent did not compel the debtor's proposed reading because it would have rendered the noun "payment" superfluous. *See id.* at 511-12.

is "quite plausible as a matter of common sense" that the "committed by" phrase modifies the words "use or attempted use of physical force" as well as the words "the threatened use of a deadly weapon." As a result, we could swiftly dismiss any contention that the Government is only required to prove a domestic relationship where the predicate offense involved the use of a deadly weapon. Such a reading would not be compelled because the "committed by" phrase is plausibly read to modify the entire phrase "use or attempted use of physical force, or the threatened use of a deadly weapon." Conversely, it defies common sense to accept the proposition that the "committed by" phrase does not modify the phrase immediately preceding it, but does, on the other hand, modify the term "offense." Such a reading cannot be reached without ignoring the distance separating the noun "offense" from the "committed by" phrase, as well as the structural segregation of the noun "offense" from its purported modifier. Because the reading Hayes espouses *is* compelled by the rule of the last antecedent, the "committed by" phrase must be read to modify the phrase "use or attempted use of physical force, or the threatened use of a deadly weapon," and as not modifying the noun "offense."

3.

Contrary to the position of the Government, Congress's use of the singular term "element" does not support its contention that a domestic relationship need not be an element of a predicate offense to constitute an MCDV. In *United States v. Belless*, the Ninth Circuit decided that the singular term "element" supports the proposition that the MCDV Definition requires that the predicate offense have only the single element of "the

use of physical force." 338 F.3d 1063, 1066 (9th Cir. 2003); *accord United States v. Heckenliable*, 446 F.3d 1048, 1050 (10th Cir. 2006); *United States v. Meade*, 175 F.3d 215, 218-19 (1st Cir. 1999); *United States v. Smith*, 171 F.3d 617, 620 (8th Cir. 1999). We are not convinced, however, that Congress's use of the singular term "element" is of any significance to our interpretation of the MCDV Definition. Whether a thing is an element does not depend simply upon its label. *See Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000) ("[I]t does not matter [how] the required finding is characterized . . . , because labels do not afford an acceptable answer." (internal quotation marks omitted)). Rather, a thing is an element if it is necessary to a claim or offense. *See Black's Law Dictionary* 559 (8th ed. 2004) (defining element as "[a] constituent part of a claim that must be proved for the claim to succeed"); *see also* Model Penal Code § 1.13 ("[An] 'element of an offense' means (i) such conduct or (ii) such attendant circumstances or (iii) such a result of conduct as . . . is included in the description of the forbidden conduct in the definition of the offense.").

There are multiple examples of statutory provisions that contain an "element" requiring that discrete facts be established to sustain an offense. For example, a "crime of violence"—defined by statute as an offense that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another"—has three essential components: (1) that one uses, threatens, or attempts to use force (2) that is physical (3) against another person or his property. *See, e.g.*, 18 U.S.C. §§ 16(a), 924(c)(3)(A). Likewise, even under the Government's proposed reading here, the MCDV Definition contains an example of an "element" that possesses discrete factual requirements. *See*

18 U.S.C. § 921(a)(33)(A)(ii). The words "threatened use of a deadly weapon" in clause (ii) of the MCDV Definition have three essential components: (1) that one has threatened to use (2) a weapon (3) that is deadly. *See id.* Thus, we readily agree with Judge Sentelle's *Barnes* dissent, where he aptly characterized Congress's use of the singular rather than the plural form of "element" as "largely meaningless," and framed the argument in terms of "not how many elements are involved, but what the singular element is." *See United States v. Barnes*, 295 F.3d 1354, 1369 (D.C. Cir. 2002) (Sentelle, J., dissenting); *see also supra* note 8.

C.

The Government's effort to rely on legislative history to support its position on the MCDV Definition is also unavailing. The natural reading of the MCDV Definition requires that the predicate offense have as an element a relationship component, and we are obliged to apply the statute as it is written, unless the "literal application of [the] statute will produce a result demonstrably at odds with the intentions of its drafters." *United States v. Ron Pair Enters., Inc.* 489 U.S. 235, 242 (1989) (internal quotation marks omitted). As explained below, the literal application of the plain language of the MCDV Definition is not "demonstrably at odds" with congressional intent.

In analyzing legislative history, it is proper to conduct a thorough examination of the entire history of the legislation, from introduction to passage. *See Regan v. Wald*, 468 U.S. 222, 238 (1984) (conducting "full examination of the legislative history—the Subcommittee hearings, markup sessions, floor debates, and House and Senate Reports"— to determine legislative intent). The

legislative history of the Possession Statute and the MCDV Definition relied on by the Government (and certain of our sister circuits), however, highlights one congressional speaker only, and consequently fails to account for the full history of the legislation. *See United States v. Barnes*, 295 F.3d 1364 [sic], 1365 (D.C. Cir. 2002) (limiting legislative history analysis to remarks of bill's sponsor in support of legislative intent determination); *United States v. Meade*, 175 F.3d 215, 219 (1st Cir. 1999) ("[The] statements, made by the principal architect of the bill before final passage, clearly demonstrate Congress's threshold understanding that 'misdemeanor crimes of domestic violence' would not be limited to those in which the relationship status was included as a formal element of the statute of conviction."); *United States v. Smith*, 171 F.3d 617, 620 (8th Cir. 1999) (limiting legislative history analysis to remarks of bill's sponsor). The Supreme Court has recognized that, "ordinarily even the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980); *see also Roy v. County of Lexington*, 141 F.3d 533, 539 (4th Cir. 1998) ("The remarks of individual legislators, even sponsors of legislation . . . are not regarded as a reliable measure of congressional intent."). Thus, we are not at liberty, in analyzing congressional intent, to ignore the Court's direction that we must go beyond the remarks of the legislation's sponsor and consider the enactment's entire legislative history.

The Possession Statute, under which Hayes was convicted, was enacted on September 30, 1996, and it amended the 1968 Gun Control Act to prohibit firearm possession by any person previously convicted of an

MCDV. *See* 18 U.S.C. § 922(d)(9), (g)(9). According to the bill's sponsor, Senator Lautenberg of New Jersey, the Possession Statute was intended to place domestic violence misdemeanants, who had avoided the felon-firearm prohibitions of the Gun Control Act by virtue of state statutes that typically classified domestic violence offenses as misdemeanors, on an equal footing with convicted felons, who were already prohibited by the Act from possessing firearms. *See* 142 Cong. Rec. S10377-01 (1996) (statement of Sen. Lautenberg). When introducing his bill, Senator Lautenberg stated:

> Under current Federal law, it is illegal for persons convicted of felonies to possess firearms. Yet, many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies. At the end of the day, due to outdated laws or thinking, perhaps after a plea bargain, they are, at most, convicted of a misdemeanor. In fact, most of those who commit family violence are never even prosecuted. But when they are, one-third of the cases that would be considered felonies, if committed by strangers, are instead filed as misdemeanors.

Id. at S10377-78. Other legislators reiterated the view that the aim of the Possession Statute was to make domestic misdemeanants subject to the same firearm prohibitions as felons, regardless of the classification of domestic violence offenses as misdemeanors under state law. *See id.* at S10379 (statement of Sen. Wellstone) ("We do not let people who have been convicted of a felony purchase [a] firearm. What [Senator Lautenberg] is trying to do is plug this loophole and prohibit someone convicted of domestic abuse, whether felony or misdemeanor, [from] purchasing a firearm."); 142 Cong. Rec.

S10379-01, 10380 (statement of Sen. Feinstein) ("[W]e already prohibit . . . felons from possessing a firearm. . . . [I]t is an unfortunate fact that many domestic violence offenders are never convicted of a felony. Outdated or ineffective laws often treat domestic violence as a lesser offense. . . . [P]lea bargains often result in misdemeanor convictions for what are really felony crimes.").

The relevant legislative history thus reveals that these lawmakers were focused on eliminating the loophole created by the state statutes that classified domestic violence offenses as misdemeanors, rather than as felonies. None of these congressional statements, however, directly addresses the question posed here, whether a "crime of domestic violence"—either felony or misdemeanor—would require such an offense to have, as an element, a domestic relationship between the offender and the victim. The only statement arguably on point was made by Senator Lautenberg, addressing the implementation of the enactment:

> Mr. President, convictions for domestic violence-related crimes often are for crimes, such as assault, that are not explicitly identified as related to domestic violence. Therefore, it will not always be possible for law enforcement authorities to determine from the face of someone's criminal record whether a particular misdemeanor conviction involves domestic violence, as defined in the new law. . . . I would strongly urge law enforcement authorities to thoroughly investigate misdemeanor convictions on an applicant's criminal record to ensure that none involves domestic violence, before allowing the sale of a handgun.

142 Cong. Rec. S11872-01, S118788 (1996) (statement of Sen. Lautenberg).[10] Other than the foregoing statement, which is not controlling on this point, *see GTE Sylvania*, 447 U.S. at 118, there is no indication of any legislative intention that, despite the MCDV Definition's explicit terms to the contrary, a predicate offense need not have a domestic relationship element to qualify as an MCDV.

Additionally, there are, in this instance, clear indicia that the available legislative history is an unreliable guide to Congress's intent. As the First Circuit observed in *United States v. Hartsock*, "[b]ecause the Lautenberg Amendment was ultimately passed as a part of a last minute series of congressional maneuvers, *the legislative history concerning the statute is sparse. Indeed, neither the House nor the Senate held hearings on the statute.*" 347 F.3d 1, 5 n.4 (1st Cir. 2003) (emphasis added) (citations omitted). There is thus no reliable indication in the legislative history that we should disregard the plain language of the MCDV Definition. In the face of that language, "the wisdom of Congress' action . . . is not within our province to second-guess." *Eldred v. Ashcroft*, 537 U.S. 186, 222 (2003).[11] We are

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[10] Senator Lautenberg prefaced the foregoing statement by observing that his proposal "incorporates this new category of offenders into the Brady law, which provides for a waiting period for handgun purchases [and requires] local law enforcement authorities to make reasonable efforts to ensure that those who are seeking to purchase a handgun are not prohibited under Federal law from doing so." 142 Cong. Rec. S11872-01, S118788 (1996).

[11] Indeed, there is more than a thread of wisdom in requiring that the predicate offense, in order to be an MCDV, have as an element a domestic relationship. Requiring a domestic relationship element will

thus unable to read the MCDV Definition, as the Government would have us do, without rewriting it to eliminate the text and structure that Congress used, and we are not permitted to rewrite the MCDV Definition to say what *we think* Congress meant. We are instead obliged to apply its plain language. We must therefore reject the Government's contention that the legislative history evinces a clear congressional intent which excuses us from applying the plain language of the MCDV Definition.

D.

Although this appeal can be readily disposed of on the basis of the foregoing analysis, one additional point warrants our attention, that is, the rule of lenity. If we were to accept the proposition that some ambiguity exists in the MCDV Definition, the well-settled rule of lenity would require us to resolve any such ambiguity in favor of Hayes. As the Supreme Court has observed, "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Cleveland v.*

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avoid debate years later—in these circumstances, a full ten years later—about the nature of the relationship between an offender and his victim. Here, there is no dispute that Hayes and Mary Carnes were married and had a child at the time of his 1994 State Offense. In other cases, however, the relationship between the offender and his victim will likely be a subject of dispute. *See, e.g., White v. Dep't of Justice*, 328 F.3d 1361, 1369 (Fed. Cir. 2003) (considering whether substantial evidence supported finding that offender had cohabitated with victim as a spouse or been a person similarly situated to a spouse but ultimately finding cohabitation "overwhelmingly supported" by evidence). *But see United States v. Meade*, 175 F.3d 215, 222 n.1 (1st Cir. 1999) ("Federal criminal trials typically involve proof and differential fact finding, and the issue of relationship status is by no means outside a jury's competence.").

United States, 531 U.S. 12, 25 (2000) (internal quotation marks omitted). "The rule of lenity is premised on two ideas: First, a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed; second, legislatures and not courts should define criminal activity." *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 704 n.18 (1995) (internal quotation marks omitted); *see also* 73 Am. Jur. 2d *Statutes* § 197 ("[The rule of lenity] protects the individual against arbitrary discretion by officials and judges, and guards against judicial usurpation of the legislative function which would result from enforcement of penalties when the legislative branch did not clearly prescribe them.").

Thus, even if we were unable to conclude, on the basis of the plain language of the MCDV Definition, that a predicate offense must have as an element a domestic relationship in order to constitute an MCDV, we would be obliged by the rule of lenity to resolve any such ambiguity in favor of Hayes. Contrary to the assertions of some courts, *see, e.g., United States v. Meade*, 175 F.3d 215, 222 (1st Cir. 1999), there is simply no clear congressional intent that permits us to disregard the rule of lenity and its commendable aims. As Judge Sentelle aptly observed on this very point:

> That a snippet of legislative history is more consistent with the less lenient application of a criminal statute hardly erodes the laudable principles of the rule of lenity. . . . [I]t seems to me most inconsistent with fundamental fairness and certainly with the rule of lenity to suppose that for a defendant to understand that his conduct is illegal, he must read not

> only the words of the statute, but find and construe the abstruse comments of a single senator on a single day.

United States v. Barnes, 295 F.3d 1354, 1370 (D.C. Cir. 2002) (Sentelle, J., dissenting). To read the MCDV Definition as the Government suggests would subject individuals to prosecution and possible conviction under the Possession Statute without fair warning, and would be a usurpation of the congressional function. In sum, were there ambiguity in the MCDV Definition, we would nonetheless be obliged, by virtue of the rule of lenity, to rule as we do today, that is, that a predicate offense must, in order to qualify as an MCDV, have as an element a domestic relationship.[12]

IV.

Pursuant to the foregoing, we reverse the denial of the motion to dismiss the superseding indictment and remand for such further proceedings as may be appropriate, including the withdrawal of Hayes's guilty plea

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[12] In ruling as we do today, we recognize that we are in the minority on this issue, in that several of our sister circuits have ruled that the predicate offense need not, in order to be an MCDV, contain a domestic relationship element. *See United States v. Heckenliable*, 446 F.3d 1048, 1049 (10th Cir. 2006); *United States v. Belless*, 338 F.3d 1063, 1067 (9th Cir. 2003); *White v. Dep't of Justice*, 328 F.3d 1361, 1367 (Fed. Cir. 2003); *United States v. Shelton*, 325 F.3d 553, 562 (5th Cir. 2003); *United States v. Barnes*, 295 F.3d 1354, 1365-66 (D.C. Cir. 2002); *United States v. Chavez*, 204 F.3d 1305, 1313-14 (11th Cir. 2000); *United States v. Meade*, 175 F.3d 215, 219 (1st Cir. 1999); *United States v. Smith*, 171 F.3d 617, 620 (8th Cir. 1999).

on Count One, *see* Fed. R. Crim. P. 11(a)(2), and dismissal of the superseding indictment.[13]

REVERSED AND REMANDED.

WILLIAMS, Circuit Judge, dissenting:

I would affirm the district court. Respectfully, I disagree with the majority that our sister circuits have erred in concluding that 18 U.S.C.A. § 921(a)(33)(A) (West 2000 & 2006) plainly requires that only the mode of aggression, and not the relationship status between the perpetrator and the victim, must be an element of the predicate misdemeanor offense. In addition, I find no merit in Hayes's contention that the Government may not prove the existence of a domestic relationship through evidence other than the state court's charging papers and record of his guilty plea.

In ruling as we do today, we are not *in* the minority on this issue, we *are* the minority. The nine circuits that have considered the question in a published opinion have uniformly rejected the interpretation advanced by the majority. *See United States v. Heckenliable*, 446 F.3d 1048, 1049 (10th Cir. 2006); *United States v. Belless*, 338 F.3d 1063, 1067 (9th Cir. 2003); *White v. Dept. of Justice*, 328 F.3d 1361, 1364-67 (Fed. Cir. 2003); *United States v. Shelton*, 325 F.3d 553, 562 (5th Cir. 2003); *United States v. Barnes*, 295 F.3d 1354, 1358-61 (D.C. Cir. 2002); *United States v. Kavoukian*, 315 F.3d 139, 142-44 (2d Cir. 2002); *United States v. Chavez*, 204 F.3d 1305, 1313-14 (11th Cir. 2000); *United States v. Meade*,

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[13] Hayes also maintains on appeal that the Government was not entitled to use extrinsic evidence to prove the 1994 relationship between him and Mary Carnes. Because we agree with his contention on the MCDV issue, we need not reach and address his additional contention.

175 F.3d 215, 218-21 (1st Cir. 1999); *United States v. Smith*, 171 F.3d 617, 619-21 (8th Cir. 1999).[1] Accordingly, I respectfully dissent.

I.

Section 921(a)(33)(A) defines a "misdemeanor crime of domestic violence" ("MCDV") as follows:

> Except as provided in subparagraph (C), the term "misdemeanor crime of domestic violence" means an offense that—
>
> (i) is a misdemeanor under Federal or State law; and
>
> (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabited with the victim as a spouse, parent, or guardian, or by a

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[1] A panel of this court has likewise refuted the majority's interpretation, albeit in an unpublished opinion. *See United States v. Ball*, 7 Fed. App'x. 210, 213 (4th Cir. 2001) (unpublished) (concluding that "[s]ection 921(a)(33)(A) requires the predicate offense to have only one element—the use or attempted use of physical force; the relationship between perpetrator and victim need not appear in the formal definition of the predicate offense"). Unpublished decisions, of course, lack precedential value, and I reference *Ball* simply to illustrate the overwhelming consensus that existed prior to the majority's decision in the case before us. *See* 4th Cir. R. 32.1 (citations to unpublished decisions issued prior to January 1, 2007 are permitted, but disfavored).

> person similarly situated to a spouse, parent, or guardian of the victim[.] [2]

18 U.S.C.A. § 921(a)(33)(A). Thus, the statutory definition divides the term into two separately defined components—subsection (i) explains what Congress meant by "misdemeanor," and subsection (ii) defines "crime of domestic violence." My colleagues derive their interpretation of the MCDV definition from the following observations: (1) Congress employed this bifurcated approach; (2) the "committed by . . . " phrase forms part of the second subsection; and (3) the two sentence fragments in § 921(a)(33)(A)(ii) are not separated by a semicolon. With all due respect, however, observation is not analysis. For, the reasons that follow, I believe the structure of § 921(a)(33)(A)(ii) cannot support the weight the majority would have it bear.

"Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). Questions concerning the plainness or the ambiguity of the statutory language are resolved "by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* at 341.

As explained above, the statute bifurcates the MCDV definition into two separately defined components. Section 921(a)(33)(A)(i) defines "misdemeanor" and § 921(a)(33)(A)(ii) sets forth the criteria necessary for an

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[2] Interestingly, Congress did not place a period at the end of this sentence.

offense to qualify as a "crime of domestic violence." The language of § 921(a)(33)(A)(ii), read in its natural and obvious sense, supports only one interpretation—that § 921(a)(33)(A)(ii) requires the predicate offense to have, as, an element, the use or attempted use of physical force (or the threatened use of a deadly weapon), and to have been committed by a person who has one of the enumerated relationships with the victim. Thus, the statute unambiguously requires that only the mode of aggression, and not the relationship status between the perpetrator and the victim, be included in the formal definition of the predicate misdemeanor offense.

It is significant that Congress used the singular noun "element" immediately preceding the first of two conceptually distinct attributes. *See, e.g., Meade,* 175 F.3d at 218-19. The use of force and the relationship between the aggressor and the victim "are two very different things, and thus would constitute two different elements." *Belless,* 338 F.3d at 1066. Had Congress intended that both requirements be mandatory elements of the predicate offense, it would have used the plural word "elements," or employed its often-used phrase "has as its elements," to encompass both requirements. *See Barnes,* 295 F.3d at 1363; *accord Meade,* 175 F.3d at 219; *Belless,* 338 F.3d at 1066; *Heckenliable,* 446 F.3d at 1050.

The majority's narrow focus on the placement of punctuation marks distorts the plain meaning of the statutory language and rests ultimately on a misconstruction of Supreme Court precedent. In *United States v. Naftalin,* 441 U.S. 768 (1979), the Supreme Court simply noted that "matters like punctuation are not decisive of the construction of a statute," but "where they reaf-

firm conclusions drawn from the words themselves they provide useful confirmation." 441 U.S. at 774 n.5 (internal quotation marks and alteration omitted). The majority draws no conclusions from the words themselves (other than deeming the use of the singular word "element" insignificant), basing its decision instead on the placement of the "committed by" phrase in the second of two subsections separated by a semicolon.

My colleagues' reliance on the rule of the last antecedent is likewise misguided. As the majority acknowledges, "a particular reading is not compelled by application of the rule of the last antecedent where it is 'quite plausible as a matter of common sense' that a phrase could modify more than one term or phrase." *Ante* at 9 (citing *In re Witt*, 113 F.3d 508, 511 (4th Cir. 1997)); *see also Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) (stating that the rule of the last antecedent "is not absolute and can assuredly be overcome by other indicia of meaning"). The majority asserts that an interpretation consistent with the rule of the last antecedent is compelled by the distance separating the "committed by" phrase from the word "offense." The opinion cites no support for this proposition, however, and I can conceive of none. As discussed above, to determine whether reliance on the rule of the last antecedent is appropriate, we look to whether *other indicia of meaning* suggest that a syntactically disfavored construction is plausible, not to the distance between words.

In addition, I note that the majority's approach creates a significant practical anomaly that undermines Congress's goals in enacting 18 U.S.C.A. § 922(g)(9) (West 2000). When Congress enacted § 922(g)(9), fewer than half of the states had misdemeanor statutes that

formally included relationship status as an element of a misdemeanor domestic assault offense; most states charged domestic violence offenders under their general assault statutes. *See e.g., Heckenliable*, 446 F.3d at 1051-52. In my view, it is unlikely that Congress sought to address a nationwide issue by enacting legislation that would immediately become a dead letter in a majority of the states.[3]

II.

Because the statute has a plain and unambiguous meaning with regard to the particular dispute at issue in this case, and the statutory scheme is coherent and consistent, resort to the legislative history is unnecessary. *See Robinson*, 519 U.S. at 340 ("Our inquiry must cease if the statutory language is unambiguous and the statu-

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[3] Although four of the five states within our jurisdiction—North Carolina, South Carolina, Virginia, and West Virginia—have misdemeanor domestic assault statutes that include both the mode of aggression and the relationship status between the perpetrator and the victim within the formal definition of the offense, *see* N.C. Gen. Stat. § 14-33(d) (2005); S.C. Code Ann. § 16-25-20 (2003 & Supp. 2006); Va. Code Ann. § 18.2-57.2 (2004 & Supp. 2006); W. Va. Code § 61-2-28 (Lexis Nexis 2005 & Supp. 2006), Maryland does not. Although Maryland has enacted a domestic violence statute, its primary focus is preventative, not punitive. Maryland Code §§ 4-501 through 5-516 of the Family Law Article authorizes courts to issue civil protective orders to victims of domestic violence and "provides for a wide variety and scope of available remedies designed to separate the parties and avoid future abuse." *Katsenelenbogen v. Katsenelenbogen*, 775 A.2d 1249, 1256 (Md. Ct. App. 2001) (internal quotation marks omitted). Perpetrators of domestic violence, of course, remain "subject to prosecution for their conduct—for assault, rape and other sexual offenses, criminal homicide, kidnapping—and, indeed, for failing to comply with relief provided in a protective order." *Id.* at 1256 n.2.

tory scheme is coherent and consistent" (internal quotation marks omitted)). Accordingly, I do not fault the majority's decision not to rely on the statute's legislative history.

I am forced, however, to take issue with my colleagues' unwillingness to concede that the available legislative history is more than "arguably" on point. My colleagues assert that "[t]he only statement arguably on point was made by Senator Lautenberg, addressing the implementation of the enactment [.]" *Ante* at 14. Senator Lautenberg explained that because

> convictions for domestic violence-related crimes often are for crimes, such as assault, that are not explicitly identified as related to domestic violence [,] . . . it will not always be possible . . . to determine from the face of someone's criminal record whether a particular misdemeanor conviction involves domestic violence, as defined in the new law. . . .

142 Cong. Rec. S11872-01, S11878 (1996). Contrary to my colleagues' characterization, I believe this comment *directly* addresses the issue of whether crimes that do not include a domestic relationship as an element qualify as MCDVs "as defined in [§ 921(a)(33)(A)]." *Id.* In addition, the legislative history reveals that § 921(a)(33)(A)(ii), as originally proposed, defined a crime of domestic violence as a "crime of violence" committed against an individual with whom the perpetrator had a domestic relationship. Some members of Congress, however, expressed concern that "crime of violence" was potentially "too broad, and could be interpreted to include an act such as cutting up a credit card with a pair of scissors." 142 Cong. Rec. S11872-01, *S11877. As a result, shortly before the statute was en-

acted, Congress replaced "crime of violence" with "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon." *See id.*

III.

Having explained the basis for my disagreement with the majority's interpretation of § 921(a)(33)(A), I now turn to the arguments advanced by Hayes. Hayes contends that the district court erred in refusing to dismiss the Superseding Indictment because the Government lacked "judicially noticeable evidence of a domestic relationship." (Appellant's Br. at 8.) This argument reflects Hayes's belief that the Government may not prove the existence of a domestic relationship through evidence other than the state court's charging papers and record of his guilty plea.[4] The district court rejected this contention, reasoning that because the MCDV definition does not require that the relationship between the victim and the perpetrator appear in the formal definition of the offense, there existed no basis for confining the Government's method of proof to state court records. The district court went on to conclude that, because the indictment tracked the language of 18 U.S.C.A. § 922(g)(9) and properly alleged each element of the

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[4] Hayes's argument stems from a somewhat puzzling misinterpretation of *United States v. Nobriga*, 408 F.3d 1178 (9th Cir. 2005), *withdrawn by* 433 F.3d 1090 (9th Cir. 2006). *Nobriga* held only that (1) a conviction under the "physically abuse" prong of Hawaii's "Abuse of a Family or Household Member" ("AFHM") statute was not categorically a conviction for an MCDV, because the Hawaii statute encompassed a broader range of relationships than those enumerated in § 921(a)(33)(A)(ii), and (2) because the relationship between Nobriga and the victim of his Hawaii AFHM conviction was not included in § 921(a)(33)(A)(ii), the Government had failed to prove that Nobriga had been previously convicted of an MCDV. *Id.* at 1182-83.

offense, the indictment was valid on its face. *See United States v. Wills*, 346 F.3d 476, 488 (4th Cir. 2003) ("An indictment returned by a legally constituted and unbiased grand jury, . . . if valid on its face, is enough to call for trial of the charges on the merits." (internal quotation marks and alteration omitted)). I find no fault with this analysis and agree with the district court that, as a result, whether the Government had sufficient evidence to prove Hayes guilty of the crime charged was a matter for the jury to decide and not a proper basis on which to challenge the indictment itself. *See Midland Asphalt Corp. v. United States*, 489 U.S. 794, 802 (1989) (stating that "[o]nly a defect so fundamental that it causes the grand jury no longer to be a grand jury, or the indictment no longer to be an indictment, gives rise to the constitutional right not to be tried").

Hayes's second argument on appeal parallels his first. He contends that the district court erred in admitting "extrinsic evidence" of a domestic relationship, because under *Shepard v. United States*, 544 U.S. 13 (2005), and *United States v. Washington*, 404 F.3d 834 (4th Cir. 2005), the charging documents, the terms of the plea agreement, the transcript of the plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented constitute the only acceptable means to prove a prior conviction.

I agree with the district court that the evidentiary limits in *Shepard* and *Washington* apply only to *judicial* fact-finding. The restrictions safeguard a defendant's Sixth Amendment right "to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged," *United States v. Gaudin*, 515 U.S. 506, 522-23 (1995), and "any particular

fact that the law makes essential to his punishment," *United States v. Booker*, 543 U.S. 220, 232 (2005) (internal quotation marks omitted). There exists no logical or precedential basis for the extension of the same limitations to the range of evidence that is admissible when the Government is being put to its burden of proof at trial.

IV.

In sum, I would hold that § 921(a)(33)(A) plainly requires that only the mode of aggression, and not the relationship status between the perpetrator and the victim, must be an element of the predicate misdemeanor offense. The Government, of course, remains obligated to prove the existence of a domestic relationship as defined in § 921(a)(33)(A)(ii) to a jury beyond a reasonable doubt, using "extrinsic evidence" admissible under the Federal Rules of Evidence if necessary. Accordingly, I respectfully dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
WEST VIRGINIA

Criminal No. 1:05CR03
(JUDGE KEELEY)

UNITED STATES OF AMERICA, PLAINTIFF

v.

RANDY EDWARD HAYES, DEFENDANT

ORDER DENYING DEFENDANT'S MOTION TO DISMISS SUPERSEDING INDICTMENT

The Court held a hearing on June 15, 2005 to take up the defendant's "Motion to Dismiss Superseding Indictment." For the following reasons, the Court **DENIES** the defendant's motion (docket no. 56).

I. INTRODUCTION

In 1994, the defendant, Randy Edward Hayes ("Hayes") pled guilty in West Virginia magistrate court to the misdemeanor offense of battery. According to Hayes, the identity of the victim of this crime does not appear in any judicially recognized document from the magistrate court.

On January 4, 2005, a federal grand jury indicated Hayes and charged him with three counts of knowingly possessing firearms after having been convicted of a

misdemeanor crime of domestic violence, in violation of Title 18 United States Code, Sections 922(g)(9) and 924(a)(2). Subsequently, on May 4, 2005, the Grand Jury returned a superseding indictment that included a "Notice of Additional Factors" to the three counts alleged in the original indictment. The "Notice of Additional Factors" charges that Hayes has a 1994 battery conviction which meets the definition of a "misdemeanor crime of domestic violence." Hayes has moved to dismiss the superseding indictment, arguing that the Government cannot prove he violated § 922(g)(9).

II. LEGAL ANALYSIS

"'An indictment returned by a legally constituted and unbiased grand jury, . . . if valid on its face, is enough to call for trial of the charges on the merits.'" *United States v. Wills*, 346 F.3d 476, 488 (4th Cir. 2003) (quoting *United States v. Mills*, 995 F.2d 480, 487 (4th Cir. 1983)). *See Midland Asphalt Corp. v. United States*, 489 U.S. 794 (1989) ("only a defect so fundamental that it causes the grand jury no longer to be a grand jury, or the indictment no longer to be an indictment, gives rise to the constitutional right not to be tried"). Hayes argues that the superseding indictment should be dismissed because, pursuant to *United States v. Shepard*, 25 S. Ct. 1254 (2005), the Sixth Amendment bars the introduction of any evidence that the defendant has been convicted of a "misdemeanor crime of domestic violence" outside of the statute of conviction, charging document, plea agreement, plea transcript and any explicit factual finding by the trial judge to which the defendant assented. Thus, he contends, because the victim of his 1994 battery conviction has not been identified in any judicially recognized document from the West Vir-

ginia magistrate court, the United States may not proceed with its prosecution.

A. Misdemeanor Crime of Domestic Violence

To secure a conviction under § 922(g)(9), the Government must prove three elements beyond a reasonable doubt: (1) that the accused possessed, shipped, or transported a firearm; (2) that the firearm had traveled in or affected interstate commerce; and (3) that the accused had been convicted of a misdemeanor crime of domestic violence. 18 U.S.C. § 922(g)(9). *United States v. Bethurum*, 343 F.3d 712, 716 (5th Cir. 2003). Whether a predicate offense qualifies as a "misdemeanor crime of domestic violence" pursuant to 18 U.S.C. § 921(a)(33) is a question of law rather than a separate and essential element of a violation of § 922(g)(9) which must be proved to the jury beyond a reasonable doubt. *Id.* at 716-17; *see* also *United States v. Artis*, 2005 U.S. App. LEXIS 9847 (4th Cir. May 27, 2005) (unpublished).

Section 921(a)(33) defines the term "misdemeanor crime of domestic violence" as an offense that

> (i) is a misdemeanor under Federal or State law; and (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

In *United States v. Ball*, 7 Fed. Appx. 210 (4th Cir. 2001) (unpublished), a panel of the Fourth Circuit concluded that this section only requires that the predicate offense have "one element—the use or attempted use of physical force; the relationship between the perpetrator and victim need not appear in the formal definition of the predicate offense." *See also White v. Dep't of Justice*, 328 F.3d 1361 (Fed. Cir. 2003). However, the prosecutor is in no way relieved of the burden of proving "to a jury beyond a reasonable doubt that a criminal defendant had a domestic relationship as defined in 921(a)(33)(A)(ii) in order to win a conviction under 992(g)(9)." *White*, 328 F.3d at 1361.

B. The Sixth Amendment

Under the Sixth Amendment of the United States Constitution,

> [i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

This provision "gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt to every element of the crime with which he is charged." *United States v. Gaudin*, 115 S. Ct. 2310, 2320 (1995), and "any particular fact that the law makes

essential to his punishment." *United States v. Booker*, 125 S. Ct. 738, 749-50 (2005).

In *United States v. Shepard*, 125 S. Ct. 1254 (2005), the United States Supreme Court held that, in the context of the enhanced sentencing provisions of the Armed Career Criminals Amendment Act of 1986, 18 USC §924(e), the Sixth Amendment requires a sentencing court to limit itself to examining the statute of conviction, charging document, plea agreement, plea transcript and any explicit factual finding by the trial judge to which the defendant assented in determining whether a prior offense is a felony for enhancement purposes.

Following *Shepard*, in *United States v. Washington*, 404 F.3d 834 (4th Cir. 2005), the Fourth Circuit found that a defendant's sixth amendment right to a trial by jury had been violated when the district court, at sentencing, relied on facts outside the indictment to determine that his prior state law breaking and entering conviction had been a "crime of violence." Further, in a case with facts similar to this one, the Ninth Circuit held that a district court had plainly erred when it relied on a police report and a plea colloquy to determine that a misdemeanor crime of domestic violence had been committed. The Government had also failed to prove that, under Hawaiian law, a "domestic" relationship existed between the defendant and his victim. *United States* v. *Nobriga*, 2005 U.S. App. LEXIS 9220 (9th Cir. May 20, 2005).

C. DISCUSSION

Hayes argues that *Shepard*, *Washington* and *Nobriga* stand for the proposition that the only evidence the Government may introduce to prove that he commit-

ted a misdemeanor crime of domestic violence is the statute of conviction, charging document, plea agreement, plea transcript and any explicit factual finding by the trial judge to which the defendant assented. The evidentiary limits in those cases, however, apply to *judicial* fact-finding, not findings of fact made by a jury. They do not apply where, as here, the Government is being put to its burden of proof at trial. *White v. Dep't of Justice*, 328 F.3d 1361 (Fed. Cir. 2003) (holding that prosecutor has "burden to prove to a jury beyond a reasonable doubt that a criminal defendant had a domestic relationship as defined in 921(a)(33)(A)(ii) in order to win a conviction under 992(g)(9)"); *see also Ball* at 214 (stating that "district court's finding, as a matter of law, that simple battery meets the definition of misdemeanor crime of domestic violence" did not deprive the defendant of the right to have the jury decide every element of the offense because, "after hearing the evidence presented at trial, the jury found that the evidence established that Ball had been convicted of a misdemeanor crime of domestic violence—he was convicted of battering his wife in May of 1995".)

Moreover, because the indictment tracks the language of 18 U.S.C. § 922(g)(9) and properly alleges each element of the statute, the indictment is valid on its face. *Wills*, 346 F.3d at 488. Thus, whether the Government is able to prove that the defendant is guilty of the crime charged is a matter for the jury to decide and is not a proper basis on which to challenge the indictment itself.

IV. CONCLUSION

Because the indictment is valid on its face and does not violate the defendant's Sixth Amendment rights, the Court **DENIES** the defendant's motion (docket no 56).

It is **SO ORDERED.**

The Clerk is directed to transmit copies of this Order to the defendant, counsel of record and all appropriate agencies.

DATED: June 24, 2005.

/s/ IRENE M. KEELEY
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 06-4087
1:05-cr-3-IMK-ALL

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

RANDY EDWARD HAYES, DEFENDANT-APPELLANT

[Filed: July 20, 2007]

On Petition for Rehearing and Rehearing En Banc

Appellee filed a petition for rehearing and rehearing en banc.

Chief Judge Williams voted to grant panel rehearing. Judges Michael and King voted to deny.

No member of the Court requested a poll on the petition for rehearing en banc.

The Court denies the petition for rehearing and rehearing en banc.

Entered at the direction of Judge King for the Court.

For the Court,

/s/ Patricia S. Connor
CLERK

APPENDIX D

1. 18 U.S.C. 922(g)(9) provides:

It shall be unlawful for any person—

* * * * *

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

2. 18 U.S.C. 921(a)(33) (2000 & Supp. V 2005) provides:

(A) Except as provided in subparagraph (C), the term "misdemeanor crime of domestic violence" means an offense that—

(i) is a misdemeanor under Federal, State, or Tribal law; and

(ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a per son who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a per son similarly situated to a spouse, parent, or guardian of the victim

(B)(i) A person shall not be considered to have been convicted of such an offense for purposes of this chapter, unless—

(I) the person was represented by counsel in the

case, or knowingly and intelligently waived the right to counsel in the case; and

(II) in the case of a prosecution for an offense described in this paragraph for which a person was entitled to a jury trial in the jurisdiction in which the case was tried, either

(aa) the case was tried by a jury, or

(bb) the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise.

(ii) A person shall not be considered to have been convicted of such an offense for purposes of this chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

OPPOSITION BRIEF

86

No. 07-608

FILED
FEB 19 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

RANDY EDWARD HAYES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

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STATUTES AND OTHER PROVISIONS INVOLVED

Relevant statutory and regulatory provisions are set forth in the appendix to this brief. App., *infra*, 1b – 4b.

STATEMENT OF THE CASE

The Petition at 2 misidentifies the court from which this case originates; Mr. Hayes entered his conditional guilty plea to violating 18 U.S.C. 922(g)(9) in the United States District Court for the Northern District of West Virginia.

Additionally, while Mr. Hayes entered his conditional guilty plea to the predicate State-law misdemeanor battery offense in 1994, the offense actually took place in November 1993. In 1994, West Virginia enacted its domestic-battery statute, W. Va. Code § 61-2-28, which has as an element, a domestic relationship between the accused and the victim.

A knowing violation of § 922(g)(9) is a felony punishable by up to 10 years in prison, a fine of up to $250,000, or both. 18 U.S.C. 924(a)(2); 18 U.S.C. 3571(b)(3).

REASONS FOR DENYING THE WRIT

I. The Existence of a Circuit Split By Itself Is Insufficient Reason for Granting the Writ, Especially Where Subsequent Legislative Developments Have Made This Case Unlikely to Recur.

The Government's main argument is that the Fourth Circuit's ruling conflicts with that of several other circuits. Petition at 8-9. But while differences among the circuits are readily apparent, a mere numerical split has never been sufficient reason, on its own, to warrant the grant of certiorari. It "regularly happens that certiorari is denied in other cases presenting the kind of conflicts singled out by Rule 10." *Beaulieu v. United States*, 497 U.S. 1038 (1990) (White, J., dissenting from denial of certiorari). As Justice White pointed out, in the October 1989 Term alone there were at least 48 instances where a Petition presented a circuit conflict on a point of Federal law sufficiently crystallized to warrant review – yet in each case, this Court nonetheless denied certiorari. In such instances, it is undeniable that "federal law is being administered in different ways in different parts of the country," and that "citizens in some circuits are subject to liabilities or entitlements that citizens in other circuits are not burdened with or entitled to," *Id.* at 1039 – yet certiorari may be denied, and often has been.

If anything, the standard for granting certiorari based on a circuit conflict is even more exacting today, given the 1995 amendment of Rule

10(a) to require that a case involve an "important" matter before certiorari is warranted. "No longer is it enough, if it ever was, to allege a conflict among decisions without demonstrating that the conflict revolves around an 'important' question of federal law." Gressman, Geller et. al., SUPREME COURT PRACTICE (9th ed. 2007) 241.

In this case, no such "important" matter is presented. As the Government must acknowledge, the number of States with domestic-battery statutes containing a domestic-relationship element continues to grow. Although the Government cites 2002 figures showing 17 States (and Puerto Rico) with such statutes, Petition at 13, as of this writing nearly half of the States (24) have enacted such laws.[1] Even if the Fourth Circuit's rationale is

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[1] Ala. Code § 13A-6-132 (2007); Ariz. Rev. Stat. Ann. § 13-3601 (2007); Ark. Code Ann. § 5-26-305 (2007); Colo. Rev. Stat. § 18-6-800.3 (2007); Haw. Rev. Stat. § 709-906 (2007); Idaho Code Ann. § 18-918 (2007); 720 Ill. Comp. Stat. 5/12-3 (2008); Ind. Code Ann. § 35-42-2-1.3 (2007); Iowa Code § 708.2A (2006); Mich. Comp. Laws. § 750.81 (2007); Minn. Stat. § 609.2242 (2007); Miss. Code Ann. § 97-3-7 (2007); Mo. Rev. Stat. § 565.074 (2007); Mont. Code Ann. § 45-5-206 (2005); N.J. Stat. Ann. § 2C:25-19 (West 2007); N.M. Stat. Ann. § 30-3-12 (2007); N.C. Gen. Stat. § 14-33 (2007); Ohio Rev. Code Ann. § 2919.25 (LexisNexis 2008); Okla. Stat. tit. 21, § 644 (2007); S.C. Code Ann. § 16-25-20 (2006); Tenn. Code Ann. § 39-13-111 (2007); Vt. Stat. Ann. tit. 13, § 1042 (2007); Va. Code Ann. § 18.2-57.2 (2007); W. Va. Code § 61-2-28 (2007).

incorrect – which it is not, as discussed below – it will have no impact whatsoever in those States. Domestic abusers can and will be charged and convicted of an offense that has as an element a domestic relationship between the accused and victim, and which will thus constitute a "misdemeanor crime of domestic violence" under any circuit's interpretation of 18 U.S.C. 921(a)(33)(A). They will be subject to liability under § 922(g)(9) for unlawfully possessing a firearm, regardless of which reading of the statute is used.

For that matter, the Fourth Circuit's ruling, even if incorrect, will have little or no impact in four of the five States of that circuit. As the Government concedes, Virginia, West Virginia, North Carolina and South Carolina each have enacted misdemeanor domestic-battery statutes containing a domestic-relationship element. Petition at 19; *see also* fn 2, *supra*. In those States, domestic abusers will be charged under those statutes, and, if convicted, plainly will forfeit their firearm-possession rights.

Indeed, legislative developments subsequent to Mr. Hayes's misdemeanor offense in 1993 have made it extremely unlikely that this particular controversy would arise today even in West Virginia. The predicate offense forming the basis for Mr. Hayes's conviction under 18 U.S.C. 922(g)(9) was his guilty plea in Marion County Magistrate's Court to a misdemeanor battery count under W. Va. Code § 61-2-9, arising from a November 1993 incident. In 1994, though, West Virginia enacted W. Va. Code § 61-2-28, "domestic violence – criminal acts." 1994, c. 45. That statute makes it a misdemeanor for anyone

to "unlawfully and intentionally make[ ] physical contact of an insulting or provoking nature with his or her family household member or unlawfully and intentionally cause[ ] physical harm to his or her family or household member." It unquestionably meets the definition of "misdemeanor crime of domestic violence" set forth in § 921(a)(33)(A)(ii), under the construction given that term by any of the circuit courts. Accordingly, the controversy presented here is unlikely to recur often in the future – and in all likelihood, would not even recur today in West Virginia. Certainly, it does not present enough of an important, recurring issue to warrant review by this Court.

Finally, the Government's stated concern for avoiding potential "confusion" among domestic-violence offenders who relocate to another State, Petition at 19, is misplaced. "All persons are charged with knowledge of the provisions of statutes and must take note of the procedure adopted by them...." *Texaco, Inc. v. Short*, 454 U.S. 516, 531-32 & n.5 (1982), *quoting North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283 (1925). "It is elementary that every one is presumed to know the law of the land, whether that be the common law or the statutory law...." *Blumenthal v. United States*, 88 F.2d 522, 530 (8th Cir. 1937), *citing, inter alia*, *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57 (1910). Even assuming the Fourth Circuit's ruling will result in a patchwork of legal obligations among the States beyond that which Congress authorized in enacting §§ 922(g)(9) and 921(a)(33)(A) (see *infra*), it will create no meaningful burden on individuals who relocate interstate. Determining his or her ability to

possess firearms lawfully will be just one more thing an individual will need to learn with regard to his or her new State, along with its sales-tax rate, motor-vehicle laws, child-immunization requirements and myriad other rules.[2]

The Fourth Circuit's ruling simply does not have the far-reaching implications required to support the grant of certiorari. As Justice Harlan noted nearly a half-century ago,

> even where a "true" conflict may be said to exist, certiorari will sometimes be denied where it seems likely that the conflict may be resolved as a result of future cases in the Court of Appeals, or where the impact of the conflict is narrowly confined and is not apt to have continuing future consequences, as where a statute which has given rise to conflicting interpretations has been repealed or amended. [J. Harlan, *Some Aspects of the Judicial Process in the*

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[2] The Government's unsupported assertion that the Fourth Circuit ruling will burden officials charged with ensuring compliance with the Brady Handgun Violence Prevention Act, 18 U.S.C. 922(s)-(t) (2000 & Supp. V 2005), Petition at 18-19, is likewise without merit. Variances among the States' laws regarding "the use or attempted use of physical force, or threatened use of a deadly weapon" already impose on those officials some duty of analysis, that the ruling below in no way increases.

Supreme Court of the United States, 33 Austl. L.J. 108 (1959)].

That is precisely the case here. In addition to being correct, the Fourth Circuit's ruling will not cause the type of dire consequences the Government predicts.

II. The Fourth Circuit's Ruling Creates No Greater Risk of Inconsistent Application of 18 U.S.C. 922(g)(9) Than Congress Intended.

The Government asserts that the Fourth Circuit's ruling "will result in the inconsistent application of a firearms prohibition intended to apply uniformly nationwide," Petition at 19-20. Henceforth, it claims, a convicted individual's ability to possess firearms legally will depend on his State of residence. *Id.* at 8-9. But that risk of inconsistency has existed since enactment of 18 U.S.C. 922(g)(9) in 1996. Congress did not intend § 922(g)(9)'s gun-possession ban to be applied identically in all 50 States, because it deliberately tethered its definition of "misdemeanor crime of domestic violence" to State law – a common and acceptable legislative practice that, as this Court has recognized, virtually guarantees that different standards will apply in different States. *Logan v. United States*, 128 S.Ct. 475, 483 (2007) (construing 18 U.S.C. 921(a)(20)). The lack of nationwide uniformity that the Government decries thus was not caused by the Fourth Circuit, but rather was baked into § 922(g)(9) and § 921(a)(33)(A)(ii) by Congress. The ruling below does not create any

threat of inconsistency greater than that which Congress intended.

In *Logan*, this Court recently noted that a similar lack of uniformity exists with regard to 18 U.S.C. 921(a)(20). Following this Court's ruling in *Dickerson v. New Banner Institute*, 460 U.S. 103 (1983), Congress reacted by amending § 921(a)(20) to make the restoration of offenders' civil rights contingent upon the happening of various events – expungement, pardon and the like – that all are defined by State, not Federal, law. As this Court observed in *Logan*,

> Congress' decision to have restoration triggered by events governed by state law insured anomalous results. The several states have considerably different laws governing pardon, expungement, and forfeiture and restoration of civil rights. Furthermore, states have drastically different policies as to when and under what circumstances such discretionary acts of grace should be extended... *Anomalies generated by § 921(a)(20) are the inevitable consequence of making access to the exemption depend on the differing laws and policies of the several states.* [128 S. Ct. at 483, *quoting McGrath v. United States*, 60 F.3d 1005, 1009 (2d Cir. 1995) (emphasis added; internal quotations and brackets omitted)].

The same holds true for 18 U.S.C. 922(g)(9). Congress could have guaranteed the nationwide uniformity the Government desires, simply by drafting § 921(a)(33)(A) to itself define the conduct that would disqualify one from owning firearms. Instead, Congress deliberately chose to tie the statutory definition to State law. Because laws governing "the use or attempted use of physical force, or threatened use of a deadly weapon" inevitably vary from State to State – even if only slightly – the goal of nationwide uniformity that the Government seeks effectively is unattainable. The Government's stated concern about "inconsistent application of a firearms prohibition intended to apply uniformly nationwide," Petition at 19-20, does not withstand scrutiny, and does not justify the grant of certiorari.

III. Even If the Issue Is Worthy of Addressing, the Court Should Await a Case from One of the Several Circuits That Have Erred in Construing § 922(g)(9).

Although the certiorari stage typically is not the place to debate a case's merits, the procedural context of this matter warrant brief discussion of this case's merits. Given that Mr. Hayes's status as a potential felon hangs in the balance, and given that a clear majority of circuit courts to have addressed the issue have erred, it would be more appropriate for this Court to let pass the Fourth Circuit's correct ruling, and instead choose as its vehicle for addressing 18 U.S.C. 922(g)(9), a future case from one of those other circuits.

1. The Fourth Circuit was correct in concluding that § 921(a)(33)(A) requires the predicate offense to have as an element, the use of force committed by a person in a domestic relationship with the victim. Adhering to the settled doctrine that the starting point for statutory interpretation is the plain statutory text, the court properly noted that the semicolon between subsections (i) and (ii) is significant: the lack of a similar grammatical break within subsection (ii) indicates that the definition does not truncate before the words "committed by," but rather includes *all* the language of subsection (ii) in describing the element that the predicate offense must have. (Pet. App. 8a-9a). As the court correctly noted, had Congress chosen to set the phrase "committed by a current or former spouse, parent or guardian of the victim" apart in a separate clause, the Government's reading of the statute would be plausible – but Congress did not. (*Id.* at 9a).

Indeed, the Department of Justice itself has decided that Congress's chosen language does not define "misdemeanor crime of domestic violence" in the manner that the Petition asserts. In its 1998 implementing regulations, the Bureau of Alcohol, Tobacco, Firearms and Explosives rewrote the statutory language in the precise manner cited by the Fourth Circuit – to segregate the domestic-relationship requirement from that portion setting forth the element(s) that the predicate offense must have:

Sec. 478.11 Meaning of terms.

* * *

Misdemeanor crime of domestic violence. (a) Is a Federal, State or local offense that:

(1) Is a misdemeanor under Federal or State law or, in States which do not classify offenses as misdemeanors, is an offense punishable by imprisonment for a term of one year or less, and includes offenses that are punishable only by a fine. (This is true whether or not the State statute specifically defines the offense as a ``misdemeanor'' or as a ``misdemeanor crime of domestic violence.'' The term includes all such misdemeanor convictions in Indian Courts established pursuant to 25 CFR part 11.);

(2) Has, as an element, the use or attempted use of physical force (e.g., assault and battery), or the threatened use of a deadly weapon;

and

(3) Was committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the

> victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, (e.g., the equivalent of a "common law" marriage even if such relationship is not recognized under the law), or a person similarly situated to a spouse, parent, or guardian of the victim (e.g., two persons who are residing at the same location in an intimate relationship with the intent to make that place their home would be similarly situated to a spouse) [27 C.F.R. 478.11 (63 Fed. Reg. 35,520 (1998))].

Thus, the BATF deliberately chose to separate the "committed by" language from the rest of clause (ii), to make plain its view that a domestic relationship between the accused and the victim is not an element of the predicate offense. Of course, Congress could have drafted § 921(a)(33)(A) in that manner as well, but it did not. BATF's regulation should be read as a tacit admission by the Department of Justice that the Fourth Circuit's interpretation of § 921(a)(33)(A) is correct.[3]

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[3] Mr. Hayes does not assert that the BATF's regulation is worthy of deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); he simply cites it as proof that the statute as enacted by Congress does not say what the petition maintains it does – because the BATF obviously felt compelled to rewrite it. Indeed, the Government itself has acknowledged that the

2. The Fourth Circuit also correctly applied other tenets of statutory construction in reaching its conclusion. It properly recognized that the legislative history in general – and Sen. Lautenberg's comment in particular – is an "unreliable guide," in the face of the plain statutory language to the contrary. (Pet. App. 19a-20a). (Indeed, the importance that the Petition places on Sen. Lautenberg's isolated comment from among the legislative history, pp 15-17, renders it a textbook example of the dubious practice that this Court has dismissed as "an exercise in 'looking over a crowd and picking out your friends.'" *ExxonMobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (Kennedy, J.), *citing* Patricia M. Wald, Some Observations on the Use of Legislative History in the 1981 Supreme Court Term, 68 IOWA L. REV. 195, 214 (1983)).

The Fourth Circuit also correctly found, as did Judge Sentelle in his dissent from *United States v. Barnes*, 295 F.3d 1354, 1369 (D.C. Cir. 2002), that Congress's use of the singular rather than the plural

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regulation is not entitled to *Chevron* deference. *United States v. Orellana*, 405 F.3d 360, 396 & n. 63 (5th Cir. 2005); *see also United States v. Gayle*, 342 F.3d 89, 93 & n. 4 (2d Cir. 2004) ("We requested briefing from the Government and the defendant on the import of 27 C.F.R. § 478.11, and both parties agreed that ATF's interpretation of a criminal statute is not entitled to deference under *Chevron*...even if the statute were ambiguous") (internal brackets omitted).

form of "element" was "largely meaningless," since the true issue is what that singular element includes. (Pet. App. 14a-15a). And the court correctly held – again, agreeing with Judge Sentelle – that proper application of the rule of the last antecedent compels adoption of Mr. Hayes's reading of the statute, not the Government's. (Pet. App. 10a-13a).

3. The number of circuits that have erred in construing § 921(a)(33)(A), when juxtaposed with the correct analyses of the Fourth Circuit majority and of Judge Sentelle, ordinarily might argue in favor of certiorari. But the clear applicability of the rule of lenity to this case means the Court should pass over this matter, because the ultimate outcome of the case will not be changed. "Imprecision and indeterminacy are particularly inappropriate in the application of a criminal statute." *James v. United States*, 127 S. Ct. 1586, 1602 (2007) (Scalia, J., dissenting). ""In various ways over the years, [this Court] has stated that when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before [choosing] the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States v. Bass*, 404 U.S. 336, 347 (1971). The rule of lenity requires that an ambiguous criminal statute be construed in favor of the accused, and applies where, "after seizing everything from which aid can be derived, the Court is left with an ambiguous statute." *Staples v. United States*, 511 U.S. 600, 619 n. 17 (1994) (citations and internal quotation marks omitted). The fact that several circuits have analyzed the identical statutory

language and come to diametric conclusions, certainly meets the test of *Staples*. It compels application of the rule of lenity so as to absolve Mr. Hayes of criminal liability under § 922(g)(9).

Even where a clear circuit conflict exists, certiorari may be denied where resolution of the conflict would be irrelevant to the ultimate outcome of the case. *Sommerville v. United States*, 376 U.S. 909 (1964) (certiorari denied despite Government's concession that a live conflict existed as to whether Federal or State law controlled; petitioner would be liable under Federal or State law regardless of how conflict was resolved). Even if the Court granted certiorari in this case, and adopted any of the many varying rationales on which the circuits that disagree with the Fourth Circuit have based their construction of § 921(a)(33)(A), the outcome of this case should not change: Mr. Hayes's conviction must be set aside based on the rule of lenity.

Rather than make Mr. Hayes go through an extended period of uncertainty over whether he will spend the rest of his life as a convicted felon, this Court should instead wait for a decision from one of the circuits that have misinterpreted § 921(a)(33)(A) and affirmed a conviction under 18 U.S.C. 922(g)(9). In such a case, unlike this one, this Court's ruling will be outcome-determinative.

IV. An Alternate Basis Exists For Affirming Dismissal of the Superseding Indictment.

Even if the Fourth Circuit erred in analyzing § 921(a)(33), an alternate basis exists to affirm

dismissal of the superseding indictment. In determining whether the predicate offense meets the criteria of § 921(a)(33)(A), a court "is typically restricted to looking at 'the fact of conviction and the statutory definition of the prior offense.'" *United States v. Webb*, 2007 U.S. Dist. LEXIS 90541, *7 (N.D. Iowa 2007), *quoting Taylor v. United States*, 495 U.S. 575, 600 (1990). Where (as here) conviction on the predicate offense was obtained via guilty plea, the only admissible evidence is the statement of factual basis for the charge, as shown by a transcript of plea colloquy or by written plea agreement presented to the court, or by a record of comparable findings of fact adopted by the defendant upon entering the plea. *Webb* at **8-9, *quoting Shepard v. United States*, 544 U.S. 13, 20 (2005).

None of those were presented in this case. At the plea hearing held in the district court, the Government offered testimony from Special Agent Kenneth Grace of the BATF, who testified that Mr. Hayes was convicted in 1994 of simple battery, and that the victim, Mary Ann Hayes, at that time was his wife. Special Agent Grace reached that conclusion after obtaining the couple's marriage license from the Marion County (W. Va.) Clerk's Office. (4th Cir. J.A. 145). Special Agent Grace also testified that Mr. Hayes and Mary Ann Hayes had a child in common and had lived together at the time of the 1993 battery, information that he obtained from interviewing Ms. Hayes. *Id.* However, no transcript of a plea colloquy or plea agreement from Marion County Magistrate Court, where Mr. Hayes entered his plea in 1994, ever was produced. Nor was there produced a record of any finding of fact

adopted by Mr. Hayes. None of Special Agent Grace's testimony was conclusively validated in any prior proceeding. *See, United States v. Washington*, 404 F.3d 834, 840 (2005), *citing Shepard*, 544 U.S. at 21-23, 125 S.Ct. at 1260-61 (sentencing court addressing 18 U.S.C. 924(e) cannot consider items from the record of a prior conviction that were not conclusively validated in the earlier proceeding).

Allowing extrinsic evidence of the prior conviction would undercut what is at the heart of this Court's decision in *Taylor*: "that respect for congressional intent and avoidance of collateral trials require that evidence of generic conviction be confined to records of the convicting court approaching the certainty of the record of conviction in a generic crime State." *Shepard*, 544 U.S. at 23. Thus, the district court erred in allowing the Government to introduce extrinsic evidence to prove the elements of § 922(g)(9). "*Taylor* is clear that any enquiry beyond statute and charging document must be narrowly restricted to implement the object of the statute and avoid evidentiary disputes." 544 U.S. at 23 n 4.

Mr. Hayes fully briefed and argued this issue below, but the Fourth Circuit felt it unnecessary to address, given its ruling on the § 921(a)(33)(A) issue. (Pet. App. 23a fn 13). But the issue constitutes alternate grounds to affirm dismissal of the superseding indictment, and thus regardless of how § 921(a)(33)(A) is construed, the outcome of this case will not change. Certiorari should be denied. *Somerville*, 376 U.S. at 909.

CONCLUSION

The Petition raises no compelling reason for review, and it should be denied.

Respectfully submitted,

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APPENDIX A

1. 18 U.S.C. 922 provides in pertinent part:

Sec. 922. Unlawful acts

* * *

(g) It shall be unlawful for any person –

* * *

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate commerce.

2. 18 U.S.C. 921(a)(33)(A) (2000 & Supp. V 2005) provides:

Sec. 921. Definitions

(a) As used in this chapter –

* * *

(33)(A) Except as provided in subparagraph (C), the term "misdemeanor crime of domestic violence" means an offense that –

(i) is a misdemeanor under Federal or State law; and

(ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse, part, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

3. 27 C.F.R. Part 178 provides in pertinent part:

TITLE 27 – Alcohol, Tobacco Products, and Firearms

Chapter II – Bureau of Alcohol, Tobacco, Firearms and Explosives, Department of Justice

Subchapter A [Reserved]

Subchapter B – Firearms and Ammunition

* * *

PART 478 – COMMERCE IN FIREARMS AND AMMUNITION

* * *

Subpart B -- DEFINITIONS

Sec. 478.11 Meaning of terms.

* * *

Misdemeanor crime of domestic violence. (a) Is a Federal, State or local offense that:

(1) Is a misdemeanor under Federal or State law or, in States which do not classify offenses as misdemeanors, is an offense punishable by imprisonment for a term of one year or less, and includes offenses that are punishable only by a fine. (This is true whether or not the State statute specifically defines the offense as a "misdemeanor" or as a "misdemeanor crime of domestic violence." The term includes all such misdemeanor convictions in Indian Courts established pursuant to 25 CFR part 11.);

(2) Has, as an element, the use or attempted use of physical force (e.g., assault and battery), or the threatened use of a deadly weapon; and

(3) Was committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, (e.g., the equivalent of a "common law" marriage even if such relationship is not recognized under the law), or a person similarly situated to a spouse, parent, or guardian of the victim (e.g., two persons who are residing at the same location in an intimate relationship with the intent to make that place their home would be similarly situated to a spouse)....

REPLY BRIEF

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(3)

No. 07-608

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In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

RANDY EDWARD HAYES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

No. 07-608

UNITED STATES OF AMERICA, PETITIONER

v.

RANDY EDWARD HAYES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

The Fourth Circuit in this case created a conflict with nine other circuits over the proper interpretation of 18 U.S.C. 922(g)(9) and 921(a)(33)(A). The Fourth Circuit erred in concluding that persons who are convicted of misdemeanor crimes of domestic violence against their spouses or children are barred from possessing a firearm under 18 U.S.C. 922(g)(9) only if the statute under which that person was convicted includes, as an element, a domestic relationship between the perpetrator and the victim. Respondent acknowledges the conflict, but seeks to diminish its significance. Nonetheless, the question is one of recurring importance. Respondent's arguments in defense of the Fourth Circuit's decision provide no reason to avoid resolving the conflict among the circuits, and they in any event lack merit.

If allowed to stand, the Fourth Circuit's decision will substantially impede enforcement of a law designed to

provide a nationwide solution to a nationwide problem: the possession of firearms by those convicted of misdemeanor crimes of violence in a domestic context. This Court's review is therefore warranted.

A. The Conflict Among The Courts Of Appeals Merits This Court's Review

As the Fourth Circuit itself acknowledged (Pet. App. 22a n.12), and as respondent concedes (Br. in Opp. 2), the decision below conflicts with the decisions of every other court of appeals to address the issue. See *United States* v. *Heckenliable*, 446 F.3d 1048, 1049 (10th Cir.), cert. denied, 127 S. Ct. 287 (2006); *United States* v. *Belless*, 338 F.3d 1063, 1067 (9th Cir. 2003); *White* v. *Department of Justice*, 328 F.3d 1361, 1364-1367 (Fed. Cir. 2003); *United States* v. *Shelton*, 325 F.3d 553, 561-562 (5th Cir.), cert. denied, 540 U.S. 916 (2003), and 543 U.S. 1057 (2005); *United States* v. *Kavoukian*, 315 F.3d 139, 142-144 (2d Cir. 2002); *United States* v. *Barnes*, 295 F.3d 1354, 1358-1361 (D.C. Cir. 2002); *United States* v. *Chavez*, 204 F.3d 1305, 1313-1314 (11th Cir. 2000); *United States* v. *Meade*, 175 F.3d 215, 218-221 (1st Cir. 1999); *United States* v. *Smith*, 171 F.3d 617, 619-621 (8th Cir. 1999).

1. Respondent asserts (Br. in Opp. 2-7) that this acknowledged conflict is not "important" because a number of States have now enacted domestic-violence statutes that contain a domestic-relationship element. That argument overlooks the fact that a substantial number of States also have *not* enacted such statutes. In any event, the issue remains significant even in States that have enacted misdemeanor domestic-violence laws. Although it is certainly true that, in such States, "[d]omestic abusers can and will be charged and convicted of an offense that * * * [will] constitute a 'misdemeanor crime of domestic violence'

under any circuit's interpretation," *id.* at 4, it is also true that domestic abusers can and will be charged and convicted of *other* offenses, including simple assault and battery, that do not satisfy the Fourth Circuit standard.[1] Moreover, that it may *now* be possible for prosecutors in a number of States to bring charges under recently enacted misdemeanor domestic-violence laws does not alter the analysis applicable to persons who, like respondent, were convicted of domestic violence before those laws were enacted.

2. Respondent also contends that the conflict is unimportant because Section 922(g)(9) itself contemplates the possibility of inconsistent application (Br. in Opp. 7-9), and because the conflict among the circuits will impose no meaningful additional burdens on the administration of federal firearms laws (*id.* at 5-6 & n.2). Both contentions are without merit.

First, the prospect of inconsistent application of Section 922(g)(9) that results from the circuit conflict created by the decision below is not, as respondent contends, of a sort that is "baked into" the statute. Br. in Opp. 7. The circuit conflict the Fourth Circuit has created means that the same person who may legally possess firearms in South Carolina faces federal felony charges and up to a ten-year prison sentence if he moves to Georgia. See 18 U.S.C. 924(a)(2). That is not a type of inconsistency that Congress generally contemplates when enacting a federal criminal statute.

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[1] For example, the domestic-assault statute recently enacted in North Carolina requires that the offense occur "in the presence of a minor," which suggests that a substantial number of offenses involving domestic abuse will, of necessity, be prosecuted under other statutes. Act to Enhance the Penalty for an Assault in the Presence of a Minor, 2003 N.C. Sess. Laws 409 (codified N.C. Gen. Stat. § 14-33(d) (2007)).

The risk of inconsistency that respondent describes is one of a very different sort: the risk that different States will apply different standards in entering convictions that may serve as predicates for federal prosecution under Section 922(g)(9). See Br. in Opp. 7-9. But when Congress defines a range of predicate offenses by reference to certain common characteristics, as it has in Section 921(a)(33)(A), it generally does so to ensure, to the extent practicable, consistent with our federalism, the consistent application of *federal* law. Cf. *Taylor* v. *United States*, 495 U.S. 575, 582, 588-589 (1990) (explaining that, in enacting the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e) (2000 & Supp. V 2005), Congress defined predicate offenses by reference to common characteristics, rather than by reference to how States choose to label a particular offense, to "ensure, to the extent that it is consistent with the prerogatives of the States in defining their own offenses, that the same type of conduct is punishable on the Federal level in all cases" (quoting S. Rep. No. 190, 98th Cong., 1st Sess. 20 (1983)).[2]

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[2] Respondent cites this Court's recent decision in *Logan* v. *United States*, 128 S. Ct. 475 (2007), in support of the proposition that Congress "virtually guarantee[d]" that Section 922(g)(9) would be applied inconsistently by "deliberately tether[ing] its definition of 'misdemeanor crime of domestic violence' to State law." Br. in Opp. 7. Respondent's reliance on *Logan* is misplaced. The most obvious problem with respondent's reliance on *Logan*'s acknowledgment of diversity based on differences in state law is that the Court nonetheless *granted* certiorari in *Logan* to settle the meaning of federal law. *Logan* also addressed a distinct context. *Logan* concerned 18 U.S.C. 921(a)(20), which excludes convictions for which the offender had his civil rights restored from the category of convictions that, *inter alia*, qualify as predicates for sentencing under the ACCA. In response to the petitioner's argument that literal application of the civil-rights-restored exemption would anomalously treat persons whose civil rights were

Second, the decision below, if allowed to stand, will have a significant impact on federal law enforcement. It will unquestionably impede enforcement of Section 922(g)(9) in the five States within the geographic jurisdiction of the Fourth Circuit. It will also, contrary to respondent's argument (Br. in Opp. 6 n.2), impose substantial additional burdens on administration of the Brady Handgun Violence Prevention Act, 18 U.S.C. 922(s)-(t), which will now require analysis not only of whether an out-of-state buyer's prior convictions disqualify him from firearms ownership under the interpretation of Section 922(g)(9) that prevails in the jurisdiction in which the transaction occurs, but also of whether the prior convictions are considered disqualifying in the buyer's State of residence. See 18 U.S.C. 922(a)(3) and (b)(3).

B. The Court Of Appeals' Decision Is Incorrect

Respondent contends (Br. in Opp. 9-15) that this Court's review is not warranted because the Fourth Circuit's decision was correct. As respondent himself acknowledges (*id.* at 9), his merits arguments provide no reason for

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never lost more harshly than those who lost, then regained, their civil rights, the Court echoed the Second Circuit's observation that such anomalies "are the inevitable consequence of making access to the exemption depend on the differing laws and policies of the several states." *Logan*, 128 S. Ct. at 483 (quoting *McGrath* v. *United States*, 60 F.3d 1005, 1009 (2d Cir. 1995), cert. denied, 516 U.S. 1121 (1996)). But Congress's decision "to have restoration triggered by events governed by state law" under Section 921(a)(20), *ibid.* (quoting *McGrath*, 60 F.3d at 1009), is fundamentally different from Congress's decision to make certain legal consequences turn on convictions for offenses that share specified characteristics, whether those convictions were entered in federal, state, or tribal courts. See 18 U.S.C. 921(a)(33)(A). In any event, the fact that Congress may accept a degree of variation depending on actual differences in state law is not a reason to leave unresolved a conflict concerning a single question of federal law.

declining to resolve the division of authority among the circuits. Those arguments are, in any event, unsound.

1. Respondent first argues (Br. in Opp. 10-12) that the text of Section 922(a)(33)(A) supports the court of appeals' construction because Congress did not insert a more dramatic "grammatical break" between the phrase "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon," and the phrase "committed by a current or former spouse, parent, or guardian of the victim." See 18 U.S.C. 921(a)(33)(A). But while it may be true that Congress could have made its intent even clearer by separating the two phrases with a semicolon, rather than a comma, see Br. in Opp. 10, the punctuation of the phrase cannot override the plain meaning of the words Congress used in the statutory definition. See, *e.g.*, *United States Nat'l Bank* v. *Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 454 (1993). That definition uses the word "element" in the singular, and that element can only be the "use or attempted use of physical force." Although respondent suggests (Br. in Opp. 13-14) that the "committed by" phrase modifies the "use of force" language, thereby creating a "singular" element that happens to have multiple parts, that suggestion is contrary to the plain meaning of the word "commit." A person commits a criminal offense. A person does not "commit" an "element" or a "use of force."

2. Respondent also contends (Br. in Opp. 10-12) that his reading of the statute is confirmed by a Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) regulation interpreting the statutory definition of "misdemeanor crime of domestic violence," because ATF inserted a separate paragraph number and a "hard return" between the "has, as an element" phrase and the "committed by" phrase. See 27 C.F.R. 478.11. But while respondent reads ATF's

punctuation choices as a "tacit admission" that the Fourth Circuit's construction of the statute is correct, Br. in Opp. 12, the regulation points to precisely the opposite conclusion. The regulation makes clear that ATF, like the overwhelming majority of courts to address the issue, reads the statutory definition of "misdemeanor crime of domestic violence" to "include all offenses that have as an element the use or attempted use of physical force (e.g., assault and battery) if the offense is committed by one of the defined parties[,] * * * whether or not the State statute specifically defines the offense as a domestic violence misdemeanor." *Implementation of Public Law 104208, Omnibus Consolidated Appropriations Act of 1997*, 63 Fed. Reg. 35,521 (1998).

3. Respondent contends that "[t]he fact that several circuits have analyzed the identical statutory language and come to diametric conclusions * * * compels application of the rule of lenity," and therefore also compels affirmance of the judgment of the Fourth Circuit. Br. in Opp. 14-15. This Court has made clear, however, that the rule of lenity does not apply merely because it is "*possible* to articulate a construction more narrow than that urged by the Government." *Moskal* v. *United States*, 498 U.S. 103, 108 (1990). Nor is "a division of judicial authority automatically sufficient to trigger lenity." *Ibid.* As this Court has explained, "[i]f that were sufficient, one court's unduly narrow reading of a criminal statute would become binding on all other courts, including this one." *Ibid.*

The rule of lenity is, rather, reserved for situations in which, "after seizing everything from which aid can be derived," reasonable doubt persists about the meaning of the statute. *Muscarello* v. *United States*, 524 U.S. 125, 138 (1998) (citation omitted). In this case, the text, background, and purpose of Section 921(a)(33)(A) all support the conclu-

sion that Section 922(g)(9) reaches misdemeanor convictions that have, as an element, the use of force, when the government can prove that the required domestic relationship exists between offender and victim. Resort to the rule of lenity is unwarranted.

4. Finally, respondent asserts (Br. in Opp. 15-17) that the Fourth Circuit's judgment may be upheld on alternative grounds. Specifically, respondent contends that, under this Court's decisions in *Taylor*, *supra*, and *Shepard* v. *United States*, 544 U.S. 13 (2005), a court may not look beyond the fact of conviction, the statutory definition of the offense, and, in the case of conviction entered by guilty plea, records of findings of fact adopted by the defendant upon entering the plea, in order to determine whether a prior conviction qualifies as a misdemeanor crime of domestic violence under Section 921(a)(33)(A). Therefore, in respondent's view, *Taylor* and *Shepard* preclude adoption of a rule that would permit the government to prove the identity of the victim of the defendant's violent crime by other means, such as by presenting documentary or testimonial evidence. Respondent is incorrect.

Taylor and *Shepard* govern the range of documents that may be used to establish that a defendant's prior convictions categorically qualify as predicates for sentencing under the ACCA, based on the *elements* of those offenses; for that purpose, *Taylor* precludes consideration of the specific conduct underlying the convictions. See *Taylor*, 495 U.S. at 602; *Shepard*, 544 U.S. at 16, 26. Neither case, however, purports to limit the kinds of evidence that the government may adduce at trial to establish matters *other* than the elements of the defendant's prior offense. Respondent's argument thus depends crucially on resolution of the question presented: whether Section 921(a)(33)(A) requires that, to qualify as a misdemeanor crime of domestic vio-

lence, an offense contain a domestic-relationship *element*. If Section 921(a)(33)(A) does not contain such a requirement, then the principles underlying *Taylor* and *Shepard* are clearly inapplicable to the issue of whether a qualifying domestic-relationship existed between the defendant and the victim. See, *e.g.*, *Meade*, 175 F.3d at 221. The domestic-relationship issue can, therefore, be established by the defendant's admission or by presentation of testimonial and documentary evidence. In this case, it is undisputed that the victim of respondent's battery was his wife, with whom he cohabited and had a child in common. See Pet. App. 20a n.11. Respondent's argument provides no basis for declining to answer the question this case presents.

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

MARCH 2008

JOINT APPENDIX

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In the Supreme Court of the United States

UNITED STATES OF AMERICA

v.

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ON WRIT OF CERTIORARI
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JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED: NOV. 7, 2007
CERTIORARI GRANTED: MAR. 24, 2008

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

Criminal No. 1:05 CR 3
Violations: 18 USC § 922(g)(9)

UNITED STATES OF AMERICA, PLAINTIFF

v.

RANDY EDWARD HAYES, DEFENDANT

SUPERSEDING INDICTMENT

The Grand Jury charges that:

COUNT ONE

On or about January or February 2004, at or near Mannington, Marion County, West Virginia, within the Northern District of West Virginia, the defendant, **RANDY EDWARD HAYES**, having been convicted in a court of a misdemeanor crime of domestic violence, that is to say, on or about February 24, 1994, defendant, **RANDY EDWARD** HAYES, was convicted in the Magistrate Court of Marion County, West Virginia, in case number 93M-2638 of Battery; did knowingly possess in and affecting interstate commerce a firearm, that is, a Marlin rifle, model 17V, .17 caliber, serial number 97637601; in violation of Title 18, United States Code, Sections 922(g)(9) and 924(a)(2).

COUNT TWO

On or about March 24, 2004, at or near Mannington, Marion County, West Virginia, within the Northern District of West Virginia, the defendant, **RANDY EDWARD**

HAYES, having been convicted in a court of a misdemeanor crime of domestic violence, that is to say, on or about February 24, 1994, defendant, **RANDY EDWARD HAYES**, was convicted in the Magistrate Court of Marion County, West Virginia, in case number 93M-2638 of Battery; did knowingly possess in and affecting interstate commerce three (3) firearms, that is, a Marlin rifle, model 17V, .17 caliber, serial number 97631100, a Marlin rifle, model 17V, .17 caliber, serial number 97630997, and a Rossi S.A. rifle, model M4117S, .17 caliber, serial number AP022493; in violation of Title 18, United States Code, Section[s] 922(g)(9) and 924(a)(2).

COUNT THREE

On or about July 25, 2004, at or near Mannington, Marion County, West Virginia, within the Northern District of West Virginia, the defendant, **RANDY EDWARD HAYES**, having been convicted in a court of a misdemeanor crime of domestic violence, that is to say, on or about February 24, 1994, defendant, **RANDY EDWARD HAYES**, was convicted in the Magistrate Court of Marion County, West Virginia, in case number 93M-2638 of Battery; did knowingly possess in and affecting interstate commerce a firearm, that is, Winchester rifle, model 94, .30-30 caliber, serial number 4046910; in violation of Title 18, United States Code, Sections 922(g)(9) and 924(a)(2).

NOTICE OF ADDITIONAL FACTORS

The Grand Jury further charges that:

1. Defendant **RANDY EDWARD HAYES'** February 24, 1994 Battery conviction, as referenced in Counts One, Two and Three of this Superseding Indictment, constituted a misdemeanor crime of domestic violence because:

a. Battery is a misdemeanor under State law in West Virginia;

b. Battery has, as an element, the use and attempted use of physical force;

c. Defendant **RANDY EDWARD HAYES** committed the offense of Battery against the victim:

i. who was his current spouse; and

ii. who was a person with whom he shared a child in common; and

iii. who was cohabiting with and had cohabited with him as a spouse.

2. Defendant **RANDY EDWARD HAYES** was convicted of Battery on February 24, 1994, as referenced in Counts One, Two and Three of this Superseding Indictment, because:

a. He was represented by counsel in the case; and

b. Having the right to a jury trial in the jurisdiction in which the case was tried, he knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea and otherwise; and

c. This conviction has not been expunged and set aside; and

d. This conviction is not an offense for which he has been pardoned; and

e. This conviction is not an offense for which he has had civil rights restored.

A true bill,

/s/ _____
Grand Jury Foreperson
(Signature on file)

_____
THOMAS E. JOHNSTON
UNITED STATES ATTORNEY

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

Criminal Action No. 1:05CR3

UNITED STATES OF AMERICA, PLAINTIFF

v.

RANDY EDWARD HAYES, DEFENDANT

July 5, 2005

11:35 a.m.

TRANSCRIPT PROCEEDINGS OF PLEA HEARING, BEFORE THE HONORABLE IRENE M. KEELEY, CHIEF JUDGE, CLARKSBURG, WEST VIRGINIA

---

* * * * *

DIRECT EXAMINATION

BY MS. MORGAN:

Q. Special Agent Grace, where do you work?

A. With the Bureau of Alcohol, Tobacco, Firearms and Explosives.

Q. Did you have occasion to investigate alleged firearms possession by Randy Edward Hayes?

A. Yes, I did.

Q. What caused you to become involved in this investigation?

A. In the early morning hours of July the 25th, 2004 I was contacted by the Marion County Sheriff's Department relative to an arrest they had just made involving a domestic disturbance. I came to that location and met with the deputies and at that time was advised that they had arrested Mr. Hayes, who had been in possession of a firearm.

Q. And is that the firearm that's listed in Count One, the Marlin rifle?

A. No, it is not.

Q. Can you explain how you were able to learn that he actually possessed the Marlin rifle that's listed in Count One?

A. Upon further investigation I found that January or February 2004, Mr. Hayes had sold a Marlin rifle, model 17V, .17 caliber, serial number 97637601 to a Larry Orloft in Mannington.

Q. Were you able to determine whether Randy Edward Hayes had a conviction for Battery?

A. Yes. I went to the Marion County Clerk's Office and found where Mr. Hayes had been convicted February 24th, 1994 in case number 93-M-2638 of Battery.

Q. I'll ask you some questions regarding that Battery conviction in a few moments, but can you tell me what you were able to learn about the operability of the Marlin rifle that's referenced in Count One?

A. Yes. The Marlin rifle had been traded from Mr. Orloft to a Federal Firearms Licensee who had in turn sold

it to someone else. I interviewed that person. Her name is Donna Barr, I believe. It was a gift for her son. I went and interviewed her, looked at the firearm. Because it was a gift for her son, we did not seize the firearm from her but left it in her possession with the understanding she would keep custody of it in case we would need it for trial. During her interview she told me that the firearm did function, she has seen her son fire that particular firearm on several occasions.

Q. Were you able to ascertain whether or not that firearm was in and affecting interstate commerce?

A. Yes. Special Agent Greg Perry conducted interstate nexus research on this firearm and found that it was not manufactured in the State of West Virginia.

Q. Did you search records to determine whether Mr. Hayes' Battery conviction from Marion County ever was expunged or whether he received a pardon?

A. I did search records and received a certificate of no pardon from the Secretary of State and there was no documentation of any pardon of that conviction.

Q. I'd like to ask you some questions regarding the 1994 Battery conviction. Can you tell me who the victim of that offense was?

A. Mary Ann Hayes, now Mary Carnes.

Q. And was Mary Hayes in relation to Randy Hayes at the time of the 1994 Battery offense?

A. His wife.

Q. How were you able to confirm that Mary Ann Hayes was Randy Edward Hayes' wife in 1994?

A. I went to the Marion County Clerk's Office and obtained the marriage license between Mr. Hayes and Mary Ann Carnes.

Q. Were you able to determine whether Mary Ann Hayes and Randy Edward Hayes also shared a child in common in 1994?

A. Yes. I interviewed Ms. Carnes and she said that they did have a child in common.

Q. Were you able to determine whether the two of them were cohabiting or had cohabited as spouses at that time?

A. Yes. She—during the interview of Ms. Carnes she stated that they lived as husband and wife from October the 15th, 1988, the day that they were married, until sometime in May of 1995.

Q. Were you able to determine whether, in the underlying Battery case, defendant Hayes was represented by counsel?

A. Yes, he was.

Q. And how were you able to determine that?

A. When I—it's a standard practice. Anytime someone is prohibited from possessing firearms due to a misdemeanor crime of domestic violence, we get all the documentation from the Clerk's Office, which includes a signed form that he had an attorney.

Q. And were you able to determine whether he had the right to a jury trial in that jurisdiction in Marion County Magistrate Court and waived that right?

A. Yes. One of the same forms is also initialed by Mr. Hayes.

Q. And were Mr. Hayes' civil rights ever restored to him following this Battery conviction in 1994?

A. No, they were not.

Q. With respect to the Marlin rifle referenced in Count One, can you describe how that was packaged at the time that it was sold? Did Mr. Orloft relate that information to you?

A. I believe it—it appeared to be in a box and probably new because I specifically remember talking to Ms. Barr that—and the FF—the Federal Firearms Licensee who took it in, saying that it looked brand new in the box.

Q. You have referenced a Winchester firearm that the defendant possessed on the night that he was arrested that led you to become involved in this case?

A. Yes.

Q. Can you please relate for the Court the information regarding where that firearm came from?

A. From—I believe—according to Mr. Hayes during our interview that it was given to him from his father.

Q. Can you describe the age of that firearm as represented to you by Mr. Hayes that night?

A. I believe his exact words were an old rust bucket and had some question about whether it would even fire or not or operate or not.

* * * * *

Q. Can you explain what Mary Ann Hayes told you about what caused her to call 911 that night?

A. Yeah. She was called on the telephone by her son, which is also Mr. Hayes' son, and said that Mr. Hayes and his now girlfriend were in some type of domestic disturbance and wanted to come home. Ms. Mary Ann Hayes Carnes told me that she got on the phone with Ms. Oldaker, Misty Oldaker, which was Mr. Hayes' current girlfriend, and said that—and Misty told her that Mr. Hayes was threatening her with a gun. At that time Ms. Carnes contacted the police and then according to the Marion County Sheriff's Department dispatch record, she met with a police unit at the Mannington Exxon—with a Deputy at the Mannington Exxon.

Q. And Ms. Mary Ann Hayes then proceeded to the residence shared by the defendant and his now girlfriend, Misty Oldaker?

A. My understanding is she stayed there because there was mention of a firearm being present, so she stayed there and the deputies responded to the house.

Q. So Ms. Hayes, Mary Ann Hayes, now Mary Ann Carnes, never actually was physically present at the residence?

A. To be honest, I'm not sure if at some point she did come up to actually get her son or someone brought her son to her. I'm very unclear on exactly what transpired after that.

Q. So your information regarding the defendant's alleged possession of firearms this night comes from the police department and their records and the seizure of the firearm and from the information given to you by Mary Ann Hayes, now Carnes?

A. That's correct.

MS. MORGAN: No further questions, Your Honor.

* * * * *

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF WEST VIRGINIA

Criminal No. 1:05CR3
(Judge Keeley)

UNITED STATES OF AMERICA, PLAINTIFF

v.

RANDY EDWARD HAYES, DEFENDANT

ORDER FOLLOWING PLEA HEARING AND SCHEDULING SENTENCING HEARING

On the 5th day of July, 2005, came the United States of America and Thomas Johnston, United States Attorney for the Northern District of West Virginia, by Shawn A. Morgan, Assistant United States Attorney, and also came the defendant in person and by his attorney, Troy Giatras.

The Court confirmed that the defendant had received and reviewed with his attorney the Superseding Indictment in this matter. After the Court read Count One of the Superseding Indictment to the defendant, counsel for the United States advised the Court that it had entered into a conditional plea agreement with the defendant, which the Government then summarized for the Court. As a condition to that agreement, the defendant will retain his appellate rights regarding the denial of his motion to dismiss the Superseding Indictment. The defendant will also retain his appellate rights regarding any cross reference that may be applied by the Court at sentencing. The defendant stated in open court that he fully understood and

agreed with the terms of this plea agreement, and that there are no other agreements between his and the Government. The Court noted that since the plea agreement contains certain nonbinding recommendations pursuant to Fed. R. Crim. P. 11(e)(1)(B), the Court cannot accept or reject the plea agreement and the recommendations it contains until the Court has had an opportunity to receive and review a presentence report. The Court advised the parties that it is not bound by the stipulations contained in the plea agreement, and will defer action on the stipulations until receiving and reviewing the presentence report.

The Court **ORDERED** the plea agreement filed.

The Court advised the defendant of the maximum sentence for Count One, to which the proposes to enter a conditional plea of guilty. The Court also advised the defendant that, as part of the fine, he could be required to pay the costs of imprisonment, community confinement, or supervision. The Court also informed the defendant of the mandatory special assessment applicable to this case, and that restitution is not an issue in this case.

The Court informed the defendant that certain Sentencing Guidelines apply to this case in an advisory capacity. The Court explained that the sentencing range established by the Guidelines is one of several factors that the Court will consider before imposing sentence. 18 U.S.C. § 3553(a); *United States v. Booker*, 125 S. Ct. 738 [(2005)]. The defendant stated that he had reviewed the various sentencing factors with his attorney. The Court also noted that it is not bound by the recommendations or stipulations in the plea agreement and that, should the sentence ultimately imposed be more severe than that expected, defendant would not have the right to withdraw his plea of guilty.

The Court noted that paragraphs eleven and twelve of the plea agreement provide:

> 11. The defendant understands that the United States Sentencing Guidelines are now advisory and no longer mandatory. It is therefore understood that the sentencing court may ascertain and impose a sentence below or above the applicable Guideline range, so long as that sentence is reasonable and within the statutory maximum specified in Title 18 of the United States Code for the particular offense of conviction.
>
> 12. The above paragraph notwithstanding, the defendant will retain the appellate rights with respect to (a) the denial of his motion to dismiss the Superseding Indictment; (b) the applicability of a cross-reference under § 2K2.1(b)(2); (c) any sentence imposed above the applicable Guideline range at an adjusted offense level 17 or higher. This reservation of rights is designed to ensure that the United States and the defendant retain the benefits of the plea agreement. It is not intended to represent the defendant's estimation of what an appropriate or reasonable sentence would or should be. Nor does this reservation of rights prevent the defendant from arguing for a sentence below the aforementioned adjusted Guideline offense levels. the United States also will retain its appellate rights with respect to any sentence imposed below the applicable Guideline range at an adjusted offense level 5 or lower (if a cross-reference under § 2K2.1(b)(2) is applied) or with respect to any sentence imposed below the applicable Guideline range at an adjusted offense level

> 5 or lower (if a cross-reference under § 2K2.1(b)(2) is applied. Aside from these limited exceptions, the defendant waives his right to appeal and also waives his right to challenge his sentence or the manner in which it was determined in any collateral attack, including, but not limited to, a motion brought under Title 28, United States Code, Section 2255. The parties have the right during any appeal to argue in support of the sentence.

The Court reviewed with the defendant all of the rights he would forfeit by tender of a plea of guilty, including his right to plead not guilty and maintain that plea during a trial before a jury of his peers. The Court also informed the defendant of his right to be represented by counsel during trial, his right not to testify and to have the Government prove its case beyond a reasonable doubt. The Court also noted that the jury's verdict must be unanimous, and that the defendant would forfeit his rights to vote, to hold public office and to bear arms by pleading guilty. The defendant stated in open court that he understood all of these rights and understood that he would be giving up all of these right by entering a conditional plea of guilty. The defendant and his counsel stated that the defendant understood all of the consequences of pleading guilty.

The Government then called Special Agent Kenneth Grace of the Bureau of Alcohol, Tobacco and Firearms ("ATF") to present a factual basis for the plea. Special Agent Grace testified that on July 25, 2004, the Marion County Sheriff's Department contacted him regarding a domestic dispute involving the arrest of the defendant and the possession of a firearm. The July 25, 2005 domestic dispute that gave rise to the current legal dispute involved an argument between the defendant and a girlfriend that

somehow involved a Winchester firearm. According to the Marion County Sheriff, the defendant stated that the Winchester was given to him by his father. The defendant also referred to the firearm as "an old rusty bucket" that would likely not even fire.

During the ATF's investigation, Special Agent Grace discovered that the defendant had also been in the possession of additional firearms. The firearm described in Count One of the indictment is a Marlin rifle that was sold by the defendant to Larry Orloft, a registered firearms retailer. The final purchaser of the firearm stated that the rifle was functional and appeared new.

Special Agent Greg Perry performed an interstate nexus check on the firearm, discovered that it was not manufactured in West Virginia and, therefore, had traveled in interstate commerce. Through police and court records, Special Agent Grace confirmed that defendant was convicted of a charge of battery on February 24, 1994; that this prior conviction had not been expunged; and that defendant's civil rights have not been restored. The 1994 conviction involved Mary Ann Hayes, defendant's wife at that time. The couple were married and co-habited from October 15, 1988 until sometime in May, 1995 and had one child in common. Special Agent Grace also confirmed that the defendant had counsel at the 1994 conviction and had waived his right to jury trial.

Defendant then moved the Court for permission to withdraw his plea of NOT GUILTY to Count One of the Superseding Indictment and enter a conditional plea of GUILTY. The defendant stated that he was in fact guilty of the crime charged in Count One of the Superseding Indictment.

The defendant stated that the plea was not a result of any threat, coercion or harassment and that the plea was not the result of any promise except those contained in the plea agreement.

The defendant further stated that his attorney had adequately represented him in this matter. Outside those defenses reserved by the conditional plea, the defendant also stated that neither he nor his attorney had found an adequate defense to the charges contained in Count One of the Superseding Indictment.

Based upon the defendant's statements and the testimony of Special Agent Grace, the Court finds that the plea is freely and voluntarily given, that the defendant is aware of the nature of the charges against him and the consequences of his plea, and that a factual basis exists for the tendered plea. The Court accepted the defendant's plea of GUILTY of the crime charged in Count One of the Superseding Indictment.

Pursuant to Fed. R. Cirm. P. 11(e)(2) and U.S.S.G. § 6B1.1(c), acceptance of the proposed plea agreement, stipulations and nonbinding recommendations are deferred until the Court has received and reviewed the presentece report prepared in this matter.

Pursuant to § 6A1 et seq. of the United States Sentencing Guidelines, it is hereby **ORDERED** that:

1. The Probation Office shall undertake a presentence investigation of **RANDY EDWARD HAYES** and prepare a presentence report for the Court;

2. **The Government and the defendant are to provide their versions of the offense to the probation officer by July 20, 2005;**

3. The presentence report is to be disclosed to the defendant, defense counsel, and the United States on or before **August 22, 2005**; however, the Probation Officer is directed not to disclose the sentencing recommendations made pursuant to Fed. R. Crim. P. 32(b)(6)(A);

4. Counsel shall fine **WRITTEN OBJECTIONS** to the presentence report and may file a **SENTENCING MEMORANDUM** that evaluates sentencing factors the parties believe to be relevant under 18 U.S.C. § 3553(a) (including the sentencing range under the advisory Guidelines) and explains any proposed sentence, on or before **September 6, 2005;**

5. The Office of Probation shall submit to the Court the presentence report with addendum on or before **September 20, 2005**; and

6. Sentencing is set for **September 28, 2005** at **2:00 p.m.**

7. The Court continued defendant's unsecured personal recognizance bond in order to ensure his appearance before this Court at such times and places as the Court may direct with the standard conditions of bond and the special conditions restricting travel and requiring the defendant to be drug tested.

The Clerk is directed to transmit certified copies of this Order to counsel of record and the defendant.

DATED: July 7, 2005.

/s/ IRENE M. KEELEY
IRENE M. KEELEY
United States District Court

PETITIONER'S BRIEF

Batch 812
Reject 6 of 7-6089

JUN 3 2008
OFFICE OF THE CLERK

No. 07-608

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

RANDY EDWARD HAYES

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

GREGORY G. GARRE
Acting Solicitor General
Counsel of Record
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MICHAEL R. DREEBEN
Deputy Solicitor General
LEONDRA R. KRUGER
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THOMAS E. BOOTH
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QUESTION PRESENTED

Section 922(g)(9) of Title 18, United States Code, makes it a crime for any person convicted of a "misdemeanor crime of domestic violence" to possess a firearm. The question presented is whether, to qualify as a "misdemeanor crime of domestic violence" under 18 U.S.C. 921(a)(33)(A) (2000 & Supp. V 2005), an offense must have as an element a domestic relationship between the offender and the victim.

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In the Supreme Court of the United States

No. 07-608

UNITED STATES OF AMERICA, PETITIONER

v.

RANDY EDWARD HAYES

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 482 F.3d 749. The order of the district court denying respondent's motion to dismiss the indictment (Pet. App. 33a-39a) is reported at 377 F. Supp. 2d 540.

JURISDICTION

The judgment of the court of appeals was entered on April 16, 2007. A petition for rehearing was denied on July 20, 2007 (Pet. App. 40a). On October 9, 2007, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including November 7, 2007, and the petition was filed on that date. The petition for a writ of certiorari was granted on March 24, 2008. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant statutory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-2a.

STATEMENT

Following a conditional guilty plea, respondent was convicted in the United States District Court for the Northern District of West Virginia of possession of a firearm after having previously been convicted of a misdemeanor crime of domestic violence, in violation of 18 U.S.C. 922(g)(9) and 924(a)(2). He was sentenced to five years of probation, including six months of home detention with electronic monitoring. The court of appeals reversed, holding that the indictment must be dismissed because it failed to allege that respondent's state misdemeanor battery conviction was based on an offense that has, as an element, a domestic relationship between the offender and the victim. Pet. App. 1a-32a.

1. Under federal firearms laws, it is unlawful for certain persons, including any person who has been convicted of a felony in any court, "[to] possess in or affecting commerce, any firearm or ammunition." 18 U.S.C. 922(g)(1). In 1996, Congress expanded that prohibition to include persons who have been convicted in any court of a "misdemeanor crime of domestic violence." 18 U.S.C. 922(g)(9); see Treasury Department, Postal Service, and General Government Appropriations Act, 1997, Pub. L. No. 104-208, § 658(b), 110 Stat. 3009-372. The term "misdemeanor crime of domestic violence" is defined as:

an offense that—

(i) is a misdemeanor under Federal, State, or Tribal law; and

(ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim[.]

18 U.S.C. 921(a)(33)(A) (2000 & Supp. V 2005).[1] A person who knowingly violates that provision may be fined, imprisoned for not more than ten years, or both. 18 U.S.C. 924(a)(2).

2. In 1994, respondent pleaded guilty in the magistrate court of Marion County, West Virginia, to battery in violation of W. Va. Code Ann. § 61-2-9(c) (LexisNexis 1994). That statute provides: "If any person unlawfully and intentionally makes physical contact of an insulting or provoking nature with the person of another or unlawfully and intentionally causes physical harm to another person, he shall be guilty of a misdemeanor." *Ibid.* The victim named in the criminal complaint was,

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[1] After respondent committed the offense at issue in this case, Section 921(a)(33)(A) was amended to include misdemeanors under tribal, as well as federal and state law. Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 908(a), 119 Stat. 3083. That amendment is not directly relevant to respondent's case. Subsequent citations in this brief to 18 U.S.C. 921(a)(33) refer to the statute as amended, 18 U.S.C. 921(a)(33) (2000 & Supp. V 2005).

at the time of the offense, respondent's wife, with whom respondent lived and with whom he had a child in common. Pet. App. 2a; J.A. 7-8. Respondent was sentenced to one year of probation. Pet. App. 2a.

3. In 2004, law enforcement officials in Marion County, West Virginia, were summoned to respondent's home in response to a domestic violence 911 call. Respondent consented to a search. The search revealed a Winchester rifle belonging to respondent. A subsequent investigation showed that respondent had possessed at least four other rifles following his 1994 state battery conviction. Pet. App. 2a & n.2; 7/5/05 Plea Hr'g Tr. 28-29.

Respondent was indicted on three counts of possessing firearms after being convicted of a misdemeanor crime of domestic violence, in violation of 18 U.S.C. 922(g)(9) and 924(a)(2). After respondent filed a motion to dismiss the indictment, the grand jury returned a superseding indictment that alleged that respondent's 1994 state battery conviction qualified as a misdemeanor crime of domestic violence because it was a misdemeanor offense; the offense had, as an element, the use and attempted use of physical force; and the victim was respondent's wife, who cohabited with respondent and with whom he had a child in common. Pet. App. 2a-3a; J.A. 1-4.

Respondent's motion to dismiss the superseding indictment argued that his 1994 battery conviction was not a misdemeanor crime of domestic violence within the meaning of 18 U.S.C. 921(a)(33)(A), because the West Virginia battery statute, W. Va. Code Ann. § 61-2-9(c) (LexisNexis 1994), does not have, as an element, a domestic relationship between the offender and the victim. The district court denied the motion, relying on the

Fourth Circuit's unpublished decision in *United States* v. *Ball*, 7 Fed. Appx. 210, cert. denied, 534 U.S. 900 (2001). Pet. App. 33a-39a. In *Ball*, the court held that Section 921(a)(33)(A) requires only that the predicate offense have as an element the use or attempted use of force; a domestic relationship need not appear in the formal definition of the offense if the evidence shows that there was in fact a domestic relationship between the offender and victim. 7 Fed. Appx. at 213.

Pursuant to Rule 11(a)(2) of the Federal Rules of Criminal Procedure, respondent entered a conditional plea of guilty to one count of possessing a firearm after having been convicted of a misdemeanor crime of domestic violence, in violation of 18 U.S.C. 922(g)(9). Respondent reserved the right to appeal the denial of his motion to dismiss the indictment on the ground that his 1994 state battery conviction was not a misdemeanor crime of domestic violence under federal law. Pet. App. 3a-4a.

3. On direct appeal, a divided panel of the court of appeals reversed. Pet. App. 1a-32a. The court acknowledged that "several of our sister circuits have ruled that the predicate offense need not, in order to be a [misdemeanor crime of domestic violence], contain a domestic relationship element." *Id.* at 22a n.12. The court also acknowledged that the Fourth Circuit had previously reached the same conclusion in its unpublished decision in *Ball*. *Id.* at 5a n.7. But the court ruled, in conflict with these decisions, that 18 U.S.C. 921(a)(33)(A) requires that a predicate offense have, as an element, "commi[ssion] by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, par-

ent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim," 18 U.S.C. 921(a)(33)(A)(ii). The court reasoned that, because the "committed by" phrase appears in the second clause of the definition, and immediately follows the phrase, "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon," the "committed by" phrase does not modify the noun "offense," but rather the phrase beginning "has, as an element." Pet. App. 5a-10a. Therefore, the court concluded, a domestic relationship constitutes a required element of the predicate misdemeanor offense. *Id.* at 5a. The court rejected arguments based on the grammar and legislative history of Section 921(a)(33)(A), and it resolved any doubts about the meaning of the statute by reliance on the rule of lenity. *Id.* at 10a-23a.

Judge Williams dissented. Pet. App. 23a-32a. In her view, the language of the statute, "read in its natural and obvious sense, * * * unambiguously requires that only that the mode of aggression, and not the relationship status between the perpetrator and the victim, be included in the formal definition of the predicate misdemeanor offense." *Id.* at 26a. Judge Williams found it "significant" that Congress had used the word "element" in the singular, reasoning that, had Congress intended to make both the use of force and a domestic relationship required elements of the predicate offense, it would have used the word "elements," in the plural. *Ibid.*

The dissent also concluded that the majority's interpretation is inconsistent with the statute's purpose and history. The dissent noted that, when 18 U.S.C. 922(g)(9) was enacted in 1996, most States prosecuted domestic violence offenders under their general assault statutes, and fewer than half of the States had enacted

misdemeanor assault statutes containing a domestic-relationship element. Pet. App. 27a-28a. The dissent considered it "unlikely" that Congress would "enact[] legislation that would immediately become a dead letter in a majority of the states." *Id.* at 28a. The dissent also observed that the drafting history of the legislation and contemporaneous statements of its sponsor supported the conclusion that the prohibition on gun possession applies to persons "convict[ed] for domestic violence-related crimes * * * that are not explicitly identified as related to domestic violence." *Id.* at 29a (quoting 142 Cong. Rec. 26,675 (1996) (statement of Sen. Lautenberg)).

SUMMARY OF ARGUMENT

Respondent's misdemeanor conviction for battery of his wife qualifies as a "misdemeanor crime of domestic violence" and therefore triggers the federal prohibition on firearms possession in 18 U.S.C. 922(g)(9). Section 922(g)(9) requires the government to show that the defendant was convicted of a violent misdemeanor and that the defendant and victim had a qualifying domestic relationship, but the misdemeanor offense need not specify the domestic relationship as an element. The court of appeals therefore erred in concluding that the prosecution in this case was deficient.

A. The term "misdemeanor crime of domestic violence" is defined in 18 U.S.C. 921(a)(33)(A) as "an offense that * * * is a misdemeanor under Federal, State, or Tribal law; and * * * has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim," or a person with another specified domestic relationship with

the victim. In that definition, the reference to a defendant's "offense" is twice qualified: first, by a restrictive relative clause (*i.e.*, "that is a misdemeanor under Federal, State, or Tribal law; and has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon"); and next, by the phrase beginning "committed by a current or former spouse, parent, or guardian of the victim." A "misdemeanor crime of domestic violence" is, thus, an offense, committed by a person with a domestic relationship with the victim, that both is a misdemeanor and has, as an element, the use or attempted use of force, or the threatened use of a deadly weapon.

That reading is consistent with the ordinary meaning and usage of the words of the statute. Congress would not ordinarily use the word "element," in the singular, to describe two unrelated "elements" of an offense. And it is not ordinary usage to say that a person "commits" a "use or attempted use of physical force" or a "threatened use of a deadly weapon." It is, however, perfectly ordinary to say that a person "commits" an "offense."

Congress could have broken up Section 921(a)(33)(A) by placing the "committed by" clause into a separate paragraph, and thereby made its intent even clearer. But the language that Congress selected, by itself, makes Congress's intent clear. Congress's omission of a "hard return," or paragraph break, does not justify ignoring the text's clear meaning and adopting the awkward and unnatural construction reached by the court of appeals.

B. Although it is not necessary to go beyond the text of the statute in answering the question presented, the objective of Section 921(a)(33) also favors coverage of violent domestic misdemeanors, even when a domestic

relationship is not an element of the offense. Indeed, a contrary construction would frustrate Congress's purpose of achieving a national standard. Congress enacted Section 922(g)(9) and its accompanying definitional provision to address what it regarded as a nationwide problem: the possession of firearms by those convicted of violent crimes against their families and household members—crimes often prosecuted as misdemeanors rather than felonies, and therefore outside the reach of existing federal firearms laws. At the time Sections 922(g)(9) and 921(a)(33) were enacted, however, only about one-third of the States had enacted criminal misdemeanor laws that contained domestic-relationship elements; although that number has since increased, it still hovers at only about one-half. No distinctly federal misdemeanor has, as an element, a domestic relationship between the offender and the victim. And even in jurisdictions that have enacted misdemeanor laws specifically targeting domestic violence, offenses involving domestic violence will naturally continue to be prosecuted as general assault, battery, and other offenses. Congress could not have intended to enact a law that would, upon its passage, have virtually no effect in much of the country. Nor could it have intended to address what it regarded as a nationwide problem by enacting a law that would inevitably operate in a patchwork and haphazard manner.

C. The history of Sections 922(g)(9) and 921(a)(33) likewise confirms the plain meaning of the text. Early drafts of the legislation defined a predicate offense for purposes of Section 922(g)(9) as a "felony or misdemeanor crime of violence * * * committed by a current or former spouse, parent, or guardian of the victim," or by a person with another specified domestic relationship

with the victim. S. 1632, 104th Cong., 2d Sess. 1 (1996). The reference to an "element" of the offense was added only shortly before the provision was enacted, when the phrase "crime of violence" was replaced with the phrase "an offense that * * * has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon." The substitution was designed to explicate the type of covered violent offenses. It was not, however, intended to alter the relationship between the "committed by" phrase and the general reference to the defendant's crime. As the sponsor and author of the legislation explained, the statute, as enacted, applies to convictions for domestic-violence-related crimes such as assault and battery, even if the offenses were not specifically identified as related to domestic violence. In that situation, the statute contemplates a factual inquiry into the existence of a domestic relationship between the batterer and his or her victim.

Significantly, until the court of appeals issued its decision in this case, the statute had widely been read to apply to convictions under general assault and battery statutes, including by the agency charged with the regulation of commerce in firearms and ammunition. Although Congress has amended Sections 921 and 922 in other respects, it has never overridden that interpretation.

D. Permitting the government to prove the existence of a domestic relationship between offender and victim in a Section 922(g)(9) prosecution is fully consistent with this Court's cases, and raises no concerns that would justify overriding the clear import of the text, purpose, and history of the statute. Section 922(g)(9) is not a sentencing provision, but a substantive provision of criminal law. As such, it contemplates the presentation and

weighing of proof, and a finding of guilt beyond a reasonable doubt. It is well within a jury's competence to determine, based on documentary and testimonial evidence, whether the defendant shared a domestic relationship with the victim of a prior crime.

E. Finally, the rule of lenity is inapplicable here because there is no grievous ambiguity that would justify resort to the rule. Section 921(a)(33) unambiguously includes violent misdemeanors involving domestic violence, regardless of whether the formal definition of the offense included, as an element, a domestic relationship between the offender and the victim.

ARGUMENT

RESPONDENT'S MISDEMEANOR CONVICTION FOR BATTERY OF HIS WIFE QUALIFIES AS A "MISDEMEANOR CRIME OF DOMESTIC VIOLENCE" AND THEREFORE TRIGGERS APPLICATION OF 18 U.S.C. 922(g)(9)

The divided court of appeals in this case concluded that the federal prohibition on firearm possession by persons who have committed violent crimes against family or household members applies only where the statute of conviction included, as an element, a domestic relationship between the offender and the victim. If the offender was convicted in a jurisdiction that had no such statute, or if the relevant authorities chose for other reasons to prosecute the crime as, or accept a guilty plea for, simple battery, assault, or a similar offense, then, under the decision below, the firearm prohibition has no application.

The court of appeals' decision is incorrect. The text, purpose, and history of the statute all confirm what nine other courts of appeals have already held: Section 922(g)(9) prohibits firearms possession by any person

who has been convicted of a violent misdemeanor that was committed against a person having a covered domestic relationship, regardless of whether the statute of conviction included a domestic-relationship element.

A. The Text Of Section 921(a)(33)(A) Makes Clear That A "Misdemeanor Crime Of Domestic Violence" Need Not Have A Domestic-Relationship Element

Section 921(a)(33)(A) defines the term "misdemeanor crime of domestic violence" to mean "an offense that" "is a misdemeanor under Federal, State, or Tribal law; and" "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon," "committed by" a person with a specified domestic relationship with the victim. 18 U.S.C. 921(a)(33)(A). That definition expressly requires that a predicate offense have, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon. In that respect, it resembles other provisions defining the term "crime of violence" and other similar terms.[2] The definition also expressly requires that a predicate offense have been committed by a person with a domestic relationship with the victim. But Section 921(a)(33)(A) im-

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[2] See, *e.g.*, 18 U.S.C. 16(a) (defining "crime of violence" as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another"); 18 U.S.C. 924(c)(3)(A) (defining "crime of violence" as a felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another"); 18 U.S.C. 924(e)(2)(B)(i) (defining "violent felony" as a felony that "has as an element the use, attempted use, or threatened use of physical force against the person of another"); 28 U.S.C. 540A(c)(1) (defining "felony crime of violence" as "an offense punishable by more than one year in prison that has as an element the use, attempted use, or threatened use of physical force against the person of another").

poses no requirement that the domestic relationship be an *element* of the violent misdemeanor.

1. Section 921(a)(33)(A) defines the term "misdemeanor crime of domestic violence" as an "offense," and qualifies the term in two ways. First, a relative clause, introduced by the word "that," restricts the meaning of the word "offense" by setting out two defining characteristics: the "offense" must be one that: "(i) is a misdemeanor under Federal, State, or Tribal law; and" "(ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon." The word "offense" is next modified by the past participle of the verb "commit." A "misdemeanor crime of domestic violence" is, thus, an offense, committed by a person with a domestic relationship with the victim, that is a misdemeanor and has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon.

Section 921(a)(33) does not mean, as the court of appeals held in this case, that a "misdemeanor crime of domestic violence" encompasses only misdemeanor offenses that have, as elements, *both* the "use of physical force" *and* "commi[ssion] by" a person with a domestic relationship with the victim. As an initial matter, that Section 921(a)(33)(A)(ii) uses the word "element," in the singular, makes clear that Congress intended to describe only one required element. That single required element is set out in the clause immediately following the word "element": that is, "the use or attempted use of physical force, or the threatened use of a deadly weapon." Had Congress intended to require *additional* elements, separate and apart from the use of force, it presumably would have used the word "elements," in the

plural.[3] And given the conceptual distinction between the mode of aggression (*e.g.*, the use of physical force) and the relationship between aggressor and victim (*e.g.*, current or former spouse), it would be at the very least surprising to discover that Congress had subsumed both attributes in a single "element" requirement.[4]

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[3] The Dictionary Act, 1 U.S.C. 1, provides that "words importing the singular include and apply to several persons, parties, or things." This Court has recognized, however, that "this rule is not one to be applied except where it is necessary to carry out the evident intent of the statute," *First Nat'l Bank* v. *Missouri*, 263 U.S. 640, 657 (1924), and the Dictionary Act itself makes clear that the rule applies only "unless the context indicates otherwise," 1 U.S.C. 1; cf. *Rowland* v. *California Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 199 (1993). Thus, while an unvarnished statutory reference to a "buying rate," in the singular, might be read to allow for the possibility of multiple buying rates, for example, see *Barr* v. *United States*, 324 U.S. 83, 91 (1945), the context of Congress's use of the word "element" in Section 921(a)(33)(A)(ii) precludes a similar interpretation. Congress would not have used a singular noun to refer to multiple items in a list of purportedly conjunctive requirements.

[4] As a general matter, when Congress has sought to identify prior offenses by reference to multiple distinct and unreleated features, it has not grouped the features together into a single "element," but rather has used the word "elements," in the plural. See, *e.g.*, 18 U.S.C. 3559(c)(2)(A) ("[T]he term 'assault with intent to commit rape' means an offense that *has as its elements* engaging in physical contact with another person or using or brandishing a weapon against another person with intent to commit aggravated sexual abuse or sexual abuse.") (emphasis added); 18 U.S.C. 3559(c)(2)(B) ("[T]he term 'arson' means an offense that *has as its elements* maliciously damaging or destroying any building, inhabited structure, vehicle, vessel, or real property by means of fire or an explosive.") (emphasis added); 42 U.S.C. 14071(a)(3)(B) ("The term 'sexually violent offense' means * * * an offense that *has as its elements* engaging in physical contact with another person with intent to commit aggravated sexual abuse or sexual abuse.") (emphasis added).

More fundamentally, the "committed by" phrase is not naturally read to modify the phrase "has, as an element, the use of force," such that a domestic relationship might be considered a kind of required subelement of the use-of-force element. That reading not only renders the word "committed" superfluous, see, *e.g.*, *Hibbs* v. *Winn*, 542 U.S. 88, 101 (2004), but is inconsistent with "the language as we normally speak it," *Watson* v. *United States*, 128 S. Ct. 579, 583 (2007). We do not normally say that a person has "committed" a "use of force," an "attempted use of force," or a "threatened use of a deadly weapon," much less an "element." We do say, however, that a person has "committed" a crime. See *Oxford English Dictionary* 559 (2d ed. 1989) (defining "commit" as "[to] do (something wrong or reprehensible), to perpetrate, be guilty of (a crime or offence, etc.)"); *Webster's Third New International Dictionary* 457 (1993) (defining "commit" as "do, perform," and giving as an example, "convicted of *committing* crimes against the state"); *Random House Dictionary of the English Language* 412 (2d ed. 1987) (defining "commit" as "to do; perform; perpetrate," and giving as examples, "*to commit murder; to commit an error*"); *American Heritage Dictionary* 381 (3d ed. 1992) ("To do, perform, or perpetrate," and giving as an example, "*commit a murder*"). The "committed by" phrase thus is most naturally read to refer to the defendant's criminal "offense," rather than to modify the use-of-force element.

Given the clear import of the language of Section 921(a)(33), it is unsurprising that every other court of appeals to consider the question—as well as a different panel of the Fourth Circuit, see Pet. App. 5a n.7 (citing *United States* v. *Ball*, 7 Fed. Appx. 210, cert. denied, 534 U.S. 900 (2001))—has read the statute to apply to all

misdemeanor crimes of violence committed by a person with a domestic relationship with the victim, regardless of wnether the offense included a domestic-relationship element. *United States* v. *Heckenliable*, 446 F.3d 1048, 1049 (10th Cir.), cert. denied, 127 S. Ct. 287 (2006); *United States* v. *Belless*, 338 F.3d 1063, 1067 (9th Cir. 2003); *White* v. *Department of Justice*, 328 F.3d 1361, 1364-1367 (Fed. Cir. 2003); *United States* v. *Shelton*, 325 F.3d 553, 561-562 (5th Cir.), cert. denied, 540 U.S. 916 (2003); *United States* v. *Kavoukian*, 315 F.3d 139, 142-144 (2d Cir. 2002); *United States* v. *Barnes*, 295 F.3d 1354, 1358-1361 (D.C. Cir. 2002); *United States* v. *Chavez*, 204 F.3d 1305, 1313-1314 (11th Cir. 2000); *United States* v. *Meade*, 175 F.3d 215, 218-221 (1st Cir. 1999); *United States* v. *Smith*, 171 F.3d 617, 619-621 (8th Cir. 1999).

2. In reaching its contrary conclusion, the court of appeals relied on the punctuation of Section 921(a)(33)(A), as well as on the grammatical rule of the last antecedent. Neither argument provides sufficient reason to disregard the ordinary meaning of the words Congress used to define the scope of the federal prohibition on firearm possession for persons convicted of misdemeanor crimes of domestic violence.

a. First, in the court of appeals' view, that Congress placed a semicolon at the end of clause (i) of Section 921(a)(33)(A), but placed only a comma between the "has, as an element" phrase and the "committed by" phrase in clause (ii), is dispositive evidence that Congress meant to link the two phrases. Pet. App. 7a-9a. The court noted that it "might very well" have reached a different conclusion "[i]f Congress * * * had seen fit to place the second half of clause (ii)—that is, the words 'committed by a current or former spouse, parent, or

guardian of the victim'—in a separate clause." *Id.* at 9a. The court's interpretation of the punctuation that Congress used is mistaken.

It is true that Congress could have, for example, inserted a paragraph break before the "committed by" language, such that the statute read:

> [T]he term "misdemeanor crime of domestic violence" means an offense that—
>
> (i) is a misdemeanor under Federal, State, or Tribal law; and
>
> (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon,
>
> committed by a current or former spouse, parent, or guardian of the victim.

But the possibility that Congress could have made its manifest intent even more clear had it punctuated the provision differently does not mean that courts should refuse to read the words Congress wrote in a manner consistent with their ordinary, everyday meaning. Although "matters like punctuation" are useful as interpretive guides "where they reaffirm conclusions drawn from the words themselves," *United States* v. *Naftalin*, 441 U.S. 768, 774 n.5 (1979) (internal quotation marks and citation omitted), punctuation cannot override the meaning of those words. See, *e.g.*, *United States Nat'l Bank* v. *Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 454 (1993) ("[A] purported plain-meaning analysis based only on punctuation is necessarily incomplete and runs the risk of distorting a statute's true meaning."); *Costanzo* v. *Tillinghast*, 287 U.S. 341, 344 (1932)

("[P]unctuation is not decisive of the construction of a statute."); *Barrett* v. *Van Pelt*, 268 U.S. 85, 91 (1925) ("Punctuation is a minor, and not a controlling, element in interpretation.") (citation omitted); cf. *Ewing* v. *Burnet*, 36 U.S. (11 Pet.) 41, 54 (1837) ("Punctuation is a most fallible standard by which to interpret a writing; it may be resorted to when all other means fail; but the court will first take the instrument by its four corners, in order to ascertain its true meaning: if that is not apparent on judicially inspecting the whole, the punctuation will not be suffered to change it."). This Court has accordingly concluded that courts "should 'disregard the punctuation, or repunctuate, if need be, to render the true meaning of the statute.'" *United States Nat'l Bank*, 508 U.S. at 462 (quoting *Hammock* v. *Loan & Trust Co.*, 105 U.S. 77, 84-85 (1882)).[5]

Notably, Congress has used language essentially identical to that of Section 921(a)(33)(A) without using *any* semicolons or "hard returns." Section 2803 of Title 25 authorizes federal agents to make warrantless arrests for offenses committed in Indian country where:

> the offense is a misdemeanor crime of domestic violence, dating violence, stalking, or violation of a protective order and has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in com-

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[5] It is also noteworthy that clause (ii) of Section 921(a)(33)(A) lacks any punctuation mark at the end. See, *e.g.*, Pet. App. 25a (Williams, J., dissenting); *Barnes*, 295 F.3d at 1360 n.5. That omission renders it all the more difficult to ascribe dispositive weight to the punctuation of that provision.

> mon, by a person who is cohabiting with or has cohabitated with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent or guardian of the victim, and the employee has reasonable grounds to believe that the person to be arrested has committed, or is committing the crime.

25 U.S.C. 2803(3)(C) (Supp. V 2005).

The resemblance that Section 2803(3)(C) bears to Section 921(a)(33)(A) is not accidental. Section 2803(3)(C) was enacted as a companion to the provision amending Section 921(a)(33)(A)'s definition of "misdemeanor crime of domestic violence" to include misdemeanors under tribal law. Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 908(a) and (b)(3), 119 Stat. 3083. That Congress considered the two provisions in conjunction—and at a time when federal appellate courts had given uniform interpretation to Section 921(a)(33)(A)(ii), see page 16, *supra*—suggests that Congress deliberately borrowed the language of Section 921(a)(33)(A), and intended Section 2803(3)(C) to carry the same meaning. See, *e.g.*, *Bragdon* v. *Abbott*, 524 U.S. 624, 645 (1998). And that, in turn, supports the conclusion that the meaning of neither provision turns on the presence or absence of semicolons or "hard returns."[6]

b. The court of appeals also found support for its conclusion in the "rule of the last antecedent," according

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[6] Although Congress did not add tribal-law misdemeanors to Section 921(a)(33)(A) and enact Section 2803(3)(C) until after petitioner's conduct in this case, Congress's later actions can be understood to confirm the legislature's earlier intent not to treat the covered domestic relationship as an element of the offense.

to which a limiting clause or phrase is "ordinarily * * * read as modifying only the noun or phrase that it immediately follows." Pet. App. 9a (quoting *Barnhart* v. *Thomas*, 540 U.S. 20, 26 (2003), and citing 73 Am. Jur. 2d *Statutes* § 138 (2001)). Applying that rule, the court of appeals concluded that, because the "committed by" phrase immediately follows the "use of physical force" phrase, both phrases must define elements of the offense. *Id.* at 9a-13a. The court of appeals' reliance on the last-antecedent rule was misplaced.

As a preliminary matter, the rule of the last antecedent is "not an absolute and can assuredly be overcome by other indicia of meaning." *Thomas*, 540 U.S. at 26; accord 2A Norman A. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 47:33, at 490 (7th ed. 2007) (the rule of the last antecedent "is another aid to discovery of intent or meaning and is not inflexible and uniformly binding").[7] The rule is also usually accompanied by an important caveat: where, as here, the qualifying phrase is set off from the immediately preceding language by a comma, the comma is generally considered evidence that the qualifying phrase was in-

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[7] The court of appeals itself recognized the flexibility of the rule in rejecting the argument that a literal application of the rule of the last antecedent would mean that the "committed by" phrase modified only its immediate antecedent: "the threatened use of a deadly weapon." Pet. App. 12a-13a; see *Barnes*, 295 F.3d at 1361 n.7. The court concluded that such a reading "would not be compelled" because reading the "committed by" phrase to modify "use or attempted use of physical force" would be "quite plausible as a matter of common sense." Pet. App. 13a. The court's appeal to common sense should have led it to a different conclusion altogether: that the "committed by" phrase does not modify *either* "the threatened use of a deadly weapon" *or* "the use or attempted use of physical force," but rather the word "offense" (or, alternatively, the entire phrase that begins with the word "offense").

tended to reach beyond its immediate antecedent. See *id.* at 491-492 & n.5; 73 Am. Jur. 2d *Statutes* § 139.

It is particularly significant that the comma here in question separates the qualifying phrase (*i.e.*, "committed by") from the end of a relative clause (*i.e.*, the language introduced by the words "an offense *that*"). Inserting a relative clause between a noun and a qualifying phrase need not alter the intended connection between the two. Cf. William Strunk & E.B. White, *The Elements of Style* 29 (4th ed. 2000) (identifying relative clauses as an exception to the general rule that related words must be kept together). The District of Columbia Circuit has offered the following example: In the sentence "'Act 284 is a law that deals with robbery, enacted by the legislature in 1975,'" the phrase " 'enacted by the legislature in 1975' can modify both 'a law' as well as 'a law that deals with robbery.' " It does not, however, modify the word "robbery" alone. *Barnes*, 295 F.3d at 1361 n.6.

In a provision that defines the term "misdemeanor crime of domestic violence" as "an offense committed by a current or former spouse, parent, or guardian of the victim," the "committed by" phrase unquestionably modifies the word "offense." Inserting a relative clause—*i.e.*,"that is a misdemeanor under Federal, State, or Tribal law; and has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon"—does not alter that relationship. Notwithstanding the distance that necessarily results from the insertion of a lengthy relative clause, cf. Pet. App. 13a, the "committed by" phrase still modifies the reference to the defendant's "offense" (or, alternatively, the complete reference to an offense that is a misdemeanor and has a use-of-force eleme[illegible], rather than modifying only

"the use or attempted use of physical force, or the threatened use of a deadly weapon."

B. Limiting The Reach Of Section 922(g)(9) To Convictions Entered Under Domestic-Violence-Specific Laws Would Unnaturally Constrict The Scope Of The Statute

The court of appeals' interpretation of Section 921(a)(33) not only conflicts with the terms of that provision and ordinary rules of usage, but undermines the effective application of Section 922(g)(9) in a manner that Congress could not have intended.

1. Congress enacted Section 922(g)(9) as a supplement to the federal felon-in-possession law, 18 U.S.C. 922(g)(1), based on the recognition that "many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies," but "are, at most, convicted of a misdemeanor." 142 Cong. Rec. 22,985 (1996) (statement of Sen. Lautenberg). Section 922(g)(9) was designed to "close this dangerous loophole and keep guns away from violent individuals who threaten their own families." *Id.* at 22,986. Properly interpreted, the statute advances that purpose by prohibiting gun possession by any person who has been convicted of a crime involving the use of force against a current or former spouse, child, or other intimate.

By contrast, the court of appeals' reading of the statute would limit application of Section 922(g)(9) to persons convicted under criminal misdemeanor laws specifically addressing domestic violence. When Section 922(g)(9) was enacted in 1996, only about one-third of the States had enacted laws that might have satisfied the court's standard. See *Barnes*, 295 F.3d at 1364

n.12.[8] As the court of appeals has interpreted Section 921(a)(33)(A), Section 922(g)(9) would have been, on its passage, a virtual nullity in most of the country.

Although more States have enacted such laws in the years since Section 922(g)(9) was enacted, the number of States with domestic-violence misdemeanor laws is still

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[8] As of the date Section 922(g)(9) was enacted, state misdemeanor statutes specifically addressing domestic violence included: Ark. Code Ann. § 5-26-305 (LexisNexis 1995) and *id.* §§ 5-26-307 to 5-26-309; Cal. Penal Code § 243(e)(1) (West 1997); Ga. Code Ann. § 16-5-23.1(f) (LexisNexis 1996); Haw. Rev. Stat. § 709-906 (LexisNexis 1996); Idaho Code § 18-918 (LexisNexis 1996); 720 Ill. Comp. Stat. Ann. 5/12-3.2 (West 1996); Iowa Code Ann. § 708.2A (West 1996); Mich. Comp. Laws Ann. § 750.81(2)-(3) (West 1996); Minn. Stat. Ann. § 609.2242 (West 1997); Mont. Code Ann. § 45-5-206 (West 1996); N.M. Stat. Ann. § 30-3-12 (West 1996) and *id.* § 30-3-15; Ohio Rev. Code Ann. § 2919.25 (West 1997); Okla. Stat. Ann. tit. 21, § 644(C) (West 1997); S.C. Code Ann. § 16-25-20 (LexisNexis 1996); Vt. Stat. Ann. tit. 13, § 1042 (LexisNexis 1996); Va. Code Ann. § 18.2-57.2 (West 1996); and W. Va. Code Ann. § 61-2-28 (LexisNexis 1996). Other States had enacted statutes setting out guidance for the procedural handling of criminal cases involving domestic violence, prescribing treatment for offenders, or, in some cases, providing for heightened penalties for second or subsequent offenses involving violence in a domestic context, but do not appear to have treated domestic-relationship status as an element of an offense distinct from, for example, simple assault or battery. *E.g.*, Ariz. Rev. Stat. Ann. § 13-3601 (LexisNexis 1996); Colo. Rev. Stat. Ann. § 18-6-801 (West 1997); N.J. Stat. Ann. §§ 2C:15-19 *et seq.* (West 1997); see Alafair S. Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 Geo. Wash. L. Rev. 558-560 (2007) (explaining that "most jurisdictions do not define domestic violence as a separate criminal offense proven with statutory elements unique to domestic violence," and that "any differences in treatment between domestic violence and other forms of violence within the criminal justice system have been limited primarily to the procedural aspects of enforcing general criminal laws") (footnote omitted). See generally *id.* at 557-565.

only around one-half.[9] And even in those jurisdictions that have enacted domestic-violence-specific misdemeanor laws, domestic abusers can and will be charged with, and convicted of, other offenses, including simple assault and battery, that do not contain a domestic-relationship element. In many cases, the only material difference between simple assault or battery and domestic assault or battery is that the prosecution must prove an additional element to convict a defendant of the latter offense. Compare, *e.g.*, W. Va. Code Ann. § 61-2-9(c) (LexisNexis 2008) (simple battery a misdemeanor punishable by a maximum of 12 months of imprisonment and a fine of up to $500) with, *e.g.*, *id.* § 61-2-28(a) (domestic battery a misdemeanor punishable by a maximum of 12 months of imprisonment and a fine of up to $500, absent prior conviction for domestic assault, domestic battery, or simple assault or battery involving domestic violence).

If the court of appeals' interpretation were correct, that would mean that "Congress remedied one disparity—between felony and misdemeanor domestic violence convictions—while at the same time creating a new disparity among (and sometimes, within) states." *Barnes*,

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[9] Statutes passed after 1996 include: Ala. Code § 13A-6-132 (West 2005); Ind. Code § 35-42-2-1.3 (LexisNexis 2004); Kan. Stat. Ann. § 21-3412a (LexisNexis 2001); La. Rev. Stat. Ann. § 14:35.3 (West 2007); Me. Rev. Stat. Ann. tit. 17-A, § 207-A (West 2008); Miss. Code Ann. § 97-3-7 (LexisNexis 1998); Mo. Rev. Stat. § 565.074 (West 2008); Neb. Rev. Stat. § 28-323 (West 2007); Tenn. Code Ann. § 39-13-111 (LexisNexis 2000); see also N.C. Gen. Stat. § 14-33(d) (West 2007) (addressing offenses involving infliction of serious injury or use of deadly weapon on a person with whom the defendant shares a "personal relationship," and "in the presence of a minor"). Respondent has calculated that "nearly half" of the States now have "domestic-battery statutes containing a domestic-relationship element." Br. in Opp. 3 & n.1.

295 F.3d at 1364. A person who battered a spouse in a state with a misdemeanor domestic assault statute, and was prosecuted under that statute, would be prohibited by Section 922(g)(9) from owning a firearm; a person who engaged in the same conduct, but was convicted of misdemeanor simple battery or assault, would not.

Moreover, because no federal misdemeanor has as its elements the use of force against a spouse, child, or other person similarly situated, the court of appeals' decision would largely render meaningless the statute's inclusion of offenses that are "misdemeanor[s] under Federal * * * law."[10] 18 U.S.C. 921(a)(33)(A)(i); see *Barnes*, 295 F.3d at 1364-1365; cf. *Chavez*, 204 F.3d at 1313-1314 (concluding that 18 U.S.C. 922(g)(9) applies to a person convicted of misdemeanor violation of 18 U.S.C. 113(a)(4), assault by striking, beating or wounding within the maritime and territorial jurisdiction of the United States, for assaulting his wife on a military base).

As the dissenting judge observed in this case, it is unlikely that Congress, in its effort to provide a solution to a serious nationwide problem of gun-related violence in the domestic context, would have deliberately enacted legislation "that would immediately become a dead letter in a majority of the states," not to mention the federal system, Pet. App. 28a (Williams, J., dissenting).

2. Respondent has argued (Br. in Opp. 7-9) that Congress assumed the risk of inconsistent application when it chose to "tether[] its definition of 'misdemeanor crime of domestic violence' to State law"; according to respondent, that decision "virtually guarantee[d] that

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[10] State domestic-violence offenses occurring within the special maritime and territorial jurisdiction of the United States could be prosecuted under 18 U.S.C. 13. But there is no distinctly federal misdemeanor offense that would qualify.

different standards [would] apply in different States." *Id.* at 7. Respondent is incorrect.

The definition of "misdemeanor crime of domestic violence" in Section 921(a)(33)(A) is "tethered" to state law only in the sense that Congress chose to include convictions entered in state courts, as well as federal and tribal courts, as predicates for application of Section 922(g)(9). Rather than rely on the labels that the States have attached to qualifying offenses, Congress defined predicate offenses by setting out a list of required attributes. When Congress defines a range of predicate offenses by reference to certain common characteristics, as it has in Section 921(a)(33)(A), it generally does so to ensure, to the extent practicable in a federalist system, the consistent application of federal law. Cf. *Taylor* v. *United States*, 495 U.S. 575, 582, 588-589 (1990) (explaining that, in enacting the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e) (2000 & Supp. V 2005), Congress defined predicate offenses by reference to common characteristics, rather than by reference to how States choose to label a particular offense, to "ensure, to the extent that it is consistent with the prerogatives of the States in defining their own offenses, that the same type of conduct is punishable on the Federal level in all cases" (quoting S. Rep. No. 190, 98th Cong., 1st Sess. 20 (1983)).[11]

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[11] *Logan* v. *United States*, 128 S. Ct. 475 (2007), is not to the contrary. *Logan* concerned 18 U.S.C. 921(a)(20), which excludes convictions for which the offender had his civil rights restored from the category of convictions that, *inter alia*, qualify as predicates for sentencing under the ACCA. In response to the petitioner's argument that literal application of the civil-rights-restored exemption would anomalously treat persons whose civil rights were never lost more harshly than those who lost, then regained, their civil rights, the Court echoed the Second

The court of appeals' misreading of Section 921(a)(33)(A) fundamentally undermines the consistent application of federal law, resulting in a patchwork and haphazard application of a law designed to provide a solution to what Congress regarded as a serious nationwide problem: the possession of firearms by persons convicted of violent misdemeanors in a domestic context.

C. The Statute's History Confirms That Section 922(g)(9) Applies To All Persons Convicted Of Misdemeanors Involving Domestic Violence, Without Regard To Whether Domestic Relationship Status Was An Element Of The Offense

The statute's history further confirms that application of Section 922(g)(9) does not turn on whether the defendant was convicted of a crime of violence that also had, as an element, a domestic relationship between the offender and the victim.

1. Section 922(g)(9) was enacted as part of the Treasury, Postal Service, and General Government Appropriations Act, 1997, Pub. L. No. 104-208, Div. A, 110 Stat. 3009-314, which was in turn enacted as part of the Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009. Sponsored by Senator

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Circuit's observation that such anomalies "are the inevitable consequence of making access to the exemption depend on the differing laws and policies of the several states." *Logan*, 128 S. Ct. at 483 (quoting *McGrath* v. *United States*, 60 F.3d 1005, 1009 (2d Cir. 1995), cert. denied, 516 U.S. 1121 (1996)). But Congress's decision "to have restoration triggered by events governed by state law" under Section 921(a)(20), *ibid.* (quoting *McGrath*, 60 F.3d at 1009), is fundamentally different from Congress's decision to make certain legal consequences turn on convictions for offenses that share specified characteristics, whether those convictions were entered in federal, state, or tribal courts. See 18 U.S.C. 921(a)(33)(A).

Lautenberg, the initial version of the bill would have extended Section 922(g)'s prohibitions to any person "who is under indictment for, or has been convicted in any court, of any crime involving domestic violence," and would have added to Section 921(a) the following definition:

> The term 'crime involving domestic violence' means a felony or misdemeanor crime of violence, regardless of length, term, or manner of punishment, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim under the domestic or family violence laws of the jurisdiction in which such felony or misdemeanor was committed.

S. 1632, 104th Cong., 2d Sess. 1 (1996); 142 Cong. Rec. at 5840.

Before the bill was reported out of the Senate Judiciary Committee, however, Senator Lautenberg offered it as an amendment to an anti-stalking bill. See 142 Cong. Rec. at 19,394. When the anti-stalking legislation stalled in the House of Representatives, Senator Lautenberg offered his bill as an amendment to a Treasury and Postal Service appropriations bill. *Id.* at 22,985-22,986; see *id.* at 23,119. The Senate approved the amendment by a 97-2 vote. *Id.* at 22,988. That bill was subsequently subsumed within the Omnibus Consolidated Appropriations Act, which was passed on September 30, 1996. *Id.* at 26,675.

In a floor statement made on the date of the legislation's passage, Senator Lautenberg explained that the final version of the legislation differed in several respects from the previous version the Senate had passed, and that those differences in language were products of negotiations that had taken place shortly beforehand. 142 Cong. Rec. at 26,675. Among those differences was the substitution of the phrase "an offense that * * * * has, as an element, the use or attempted use of force, or the threatened use of a deadly weapon" for the phrase "crime of violence." 18 U.S.C. 921(a)(33)(A)(ii). Senator Lautenberg described the substitution as one of a number of "minor changes to the Senate-passed version that actually strengthen the ban slightly":

> [T]he revised language includes a new definition of the crimes for which the gun ban will be imposed. Under the original version, these were defined as crimes of violence against certain individuals, essentially family members. Some argued that the term crime of violence was too broad, and could be interpreted to include an act such as cutting up a credit card with a pair of scissors. Although this concern seemed far-fetched to me, I did agree to a new definition of covered crimes that is more precise, and probably broader.
>
> Under the final agreement, the ban applies to crimes that have, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon. This is an improvement over the earlier version, which did not explicitly include within the ban crimes involving an attempt to use force, or the threatened use of a weapon, if such an

attempt or threat did not also involve actual physical violence.

142 Cong. Rec. at 26,675.[12]

Senator Lautenberg's remarks made clear that the substitution of the "has, as an element" language for the "crime of violence" formulation was designed to lend

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[12] As part of the Omnibus Consolidated Appropriations Act, 1997, Congress also enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 119 Stat. 3009-575, which included a provision making commission of a "crime of domestic violence" a basis for deportation, Div. C, § 350(a), 110 Stat. 3009-639 (8 U.S.C. 1227(a)(2)(E)). That provision, like the original draft of Senate Bill 1632, defines the term "crime of domestic violence" as a "crime of violence" that is "committed by" a person with a specified domestic relationship with the victim. The statute reads:

> [T]he term "crime of domestic violence" means any crime of violence (as defined in section 16 of Title 18) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.

8 U.S.C. 1227(a)(2)(E)(i). By incorporating the definition of "crime of violence" in 18 U.S.C. 16, Section 1227(a)(2)(E)(i) covers a broader array of crimes than Section 921(a)(33)(A): Most notably, it includes crimes that have, as an element, the "threatened use of physical force," regardless of whether the threat involves the "use of a deadly weapon." Compare 18 U.S.C. 16(a) with 18 U.S.C. 921(a)(33)(A)(ii). Section 1227(a)(2)(E)(i) also includes crimes that do not have a use-of-force element, but nevertheless "involve[] a substantial risk that physical force * * * may be used in the course of committing the offense." 18 U.S.C. 16(b).

greater precision to the scope of violent criminal acts that would be covered by the statute. His remarks also made clear that the addition of the use-of-force phrase was not designed to alter the effect of the statute's domestic relationship language, which had remained largely unchanged in the final version of the legislation.[13] In discussing the implementation of the new law, Senator Lautenberg noted that the Brady Handgun Violence Prevention Act, 18 U.S.C. 922(s)-(t), requires law enforcement officials to make a "reasonable effort" to ensure that persons seeking to purchase handguns are not prohibited from doing so under federal law. See 18 U.S.C. 922(s)(2). Senator Lautenberg explained how the reasonable-effort requirement should apply in the case of persons convicted of misdemeanor crimes of domestic violence:

> [C]onvictions for domestic violence-related crimes often are for crimes, such as assault, that are not explicitly identified as related to domestic violence. Therefore, it will not always be possible for law enforcement authorities to determine from the face of someone's criminal record whether a particular misdemeanor conviction involves domestic violence, as defined in the new law.
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> * * * * *
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> In my view, the reasonable effort requirement should not be interpreted * * * so narrowly that it

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[13] The final version of the legislation omitted the final clause of the earlier proposed definition, which had included among its list of specified domestic relationships a catch-all provision for other domestic relationships recognized "under the domestic or family violence laws of the jurisdiction in which such felony or misdemeanor was committed." S. 1632, 104th Cong., 2d Sess. 2 (1996); 142 Cong. Rec. at 5840.

> would allow law enforcement agencies to routinely ignore misdemeanor convictions for violent crimes, without further exploration into whether these crimes involved domestic violence.

142 Cong. Rec. at 26,675-26,676.

Senator Lautenberg's remarks indicate that Congress was aware that domestic-violence offenses were generally prosecuted under state laws that do not contain a domestic-relationship element. The remarks also make clear Senator Lautenberg's intent that the firearm prohibition apply without regard to whether an offender's domestic-violence misdemeanor was prosecuted under a statute specifically targeting domestic violence. While one Senator's remarks are of course "not controlling," Pet. App. 19a (citing *CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980)), the explanation provided by the sponsor of the legislation and the author of its operative language is certainly pertinent legislative history. See *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 526-527 (1982). That is particularly true where, as here, the sponsor's explanation serves to confirm the reading of the statute compelled by its text and consistent with its purposes.

2. Following its enactment, Section 921(a)(33)(A) was read in a manner consistent with Senator Lautenberg's interpretation. Members of Congress so read it, see H.R. Rep. No. 845, 105th Cong., 2d Sess. 88 (1999) (describing a "misdemeanor crime of domestic violence" under the statute as "an offense that is (1) either a federal or state charge, and (2) has as an element the use or attempted use of physical force, or the threatened use of a deadly weapon, and (3) is committed by a current or former spouse," or person with another specified domes-

tic relationship with the victim), as did every court of appeals to consider the question, see page 16, *supra*.

In 1998, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), amended its regulations concerning commerce in firearms and ammunition to implement Section 922(g)(9). See *Implementation of Public Law 104208, Omnibus Consolidated Appropriations Act of 1997*, 63 Fed. Reg. 35,520 (1998); cf. 18 U.S.C. 926 (2000 & Supp. V 2005). The regulations define the term "misdemeanor crime of domestic violence" as an offense that: (1) "Is a misdemeanor"; (2) "Has, as an element, the use or attempted use of physical force (e.g., assault and battery), or the threatened use of a deadly weapon"; and (3) "Was committed by" a person with a specified domestic relationship with the victim. 27 C.F.R. 478.11 (2007); see 27 C.F.R. 478.32(a)(9). In promulgating the regulation, ATF explained:

> The definition of misdemeanor crime of domestic violence includes all offenses that have as an element the use or attempted use of physical force (*e.g.*, assault and battery) if the offense is committed by one of the defined parties. This is true whether or not the State statute specifically defines the offense as a domestic violence misdemeanor. For example, a person convicted of misdemeanor assault and battery against his or her spouse would be prohibited from receiving or possessing firearms or ammunition.

63 Fed. Reg. at 35,521.

Since the ATF promulgated its regulation, Congress has several times amended Sections 921 and 922. Congress has never, however, repudiated the ATF's interpretation of the statutory definition of "misdemeanor crime of domestic violence." Indeed, in the recent NICS

Improvement Amendments Act of 2007, Pub. L. No. 110-180, 122 Stat. 2559 (2008) (to be codified at 18 U.S.C. 922 note), Congress incorporated the existing definition of the term without altering it in any respect. *Id.* § 3, 122 Stat. 2561. That Congress has not altered the ATF's interpretation suggests that ATF has correctly interpreted the statutory language, see, *e.g.*, *North Haven Bd. of Educ.*, 456 U.S. at 535, and provides further evidence in support of the conclusion compelled by the text, purposes, and history of the statute.

D. Permitting The Government To Prove The Identity Of The Victim In A Section 922(g)(9) Prosecution Is Consistent With This Court's Cases

Respondent contends (Br. in Opp. 15-17) that, even if the statute itself contains no requirement that a predicate offense have, as an element, a domestic relationship between the offender and the victim, this Court's decisions in *Taylor*, 495 U.S. at 575, and *Shepard* v. *United States*, 544 U.S. 13 (2005), generally restrict courts to examining the fact of a prior conviction and the statutory definition of the prior offense, and thus forbid the government from relying on "extrinsic evidence" to establish the parties' domestic-relationship status. Br. in Opp. 17. Respondent's contention is without merit.

In *Taylor*, the Court considered the meaning and application of the ACCA, 18 U.S.C. 924(e) (2000 & Supp. V 2005), which provides a sentence enhancement for any person who violates Section 922(g) after three prior convictions for serious drug offenses or violent felonies, including "burglary." 18 U.S.C. 924(e)(2)(B)(ii). Reviewing the history and background of the statute, the Court determined that "Congress meant by 'burglary' the generic sense in which the term is now used in the

criminal codes of most States," namely, an offense that has "at least the following elements: an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Taylor*, 495 U.S. at 598.

The Court then turned to the problem of how to determine whether a prior conviction qualified as "burglary" within the scope of that definition. Agreeing with the uniform judgment of the courts of appeals, the Court concluded, based on the language, history, and purpose of the statute, that the ACCA "mandates a formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." *Taylor*, 495 U.S. at 600. The Court thus concluded that "an offense constitutes 'burglary' for purposes of a § 924(e) sentence enhancement if either its statutory definition substantially corresponds to 'generic' burglary, or the charging paper and jury instructions actually required the jury to find all the elements of generic burglary in order to convict the defendant." *Id.* at 602.

In *Shepard*, the Court concluded that *Taylor*'s categorical approach governs the identification of generic offenses following guilty pleas, as well as convictions following verdicts, for purposes of ACCA sentencing. The Court concluded that, where a prior conviction was the result of a guilty plea, the sentencing court may look only to "the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." *Shepard*, 544 U.S. at 16.

Together, *Taylor* and *Shepard* govern the range of documents that a court may consult to determine whether a defendant's criminal record merits imposition

of an enhanced sentence under the ACCA. The holdings of those cases have no application, however, with respect to Section 922(g)(9): a different statute with different language, different purposes, and a different history.

Moreover, respondent's reliance on a general principle of "avoidance of collateral trials," Br. in Opp. 17 (quoting *Shepard*, 544 U.S. at 23), makes little sense in this distinct context. Unlike the ACCA, Section 922(g)(9) is a substantive provision of criminal law. As such, its application naturally requires judges and juries "to engage in an elaborate factfinding process" for the simple purpose of determining whether the defendant is guilty of the offense. *Taylor*, 495 U.S. at 601. There is nothing impractical or unfair, see *ibid.*, about including the defendant's relationship to the victim of a prior violent offense in the list of matters to be established in a Section 922(g)(9) prosecution. As the First Circuit has explained, "[f]ederal criminal trials typically involve proof and differential factfinding, and the issue of a relationship status is by no means outside a jury's competence." *Meade*, 175 F.3d at 222 n.1. Furthermore, in many cases, including this one, the defendant will not dispute that he or she had a domestic relationship with the victim, and indeed may decide to admit the existence of the relationship. See Pet. App. 20 n.11; see also, *e.g.*, *Shelton*, 325 F.3d at 556; *Barnes*, 295 F.3d at 1359. Congress clearly contemplated an inquiry into domestic-relationship status in Section 922(g)(9)'s parallel restriction on firearm ownership by persons subject to domestic restraining orders. See 18 U.S.C. 922(g)(8). There is no reason to think that Congress intended Section 922(g)(9) to operate differently, based on a purported concern for avoidance of evidentiary disputes about the nature of a defendant's prior conviction.

Nor does permitting the government in a Section 922(g)(9) prosecution to prove domestic-relationship status implicate the kinds of constitutional concerns members of this Court have identified in the ACCA context. See *Shepard*, 544 U.S. at 24-26 (plurality opinion). Allowing a jury to decide, based on documentary and testimonial evidence, whether the victim of the defendant's prior crime was a person with whom the defendant had a domestic relationship (*e.g.*, a spouse), and thus whether the defendant's past crime involved domestic violence, preserves the jury trial right and is fully consistent with the Sixth Amendment.

E. The Rule Of Lenity Does Not Apply

Because the text, purpose, and history of Section 921(a)(33)(A) all confirm that the statute reaches misdemeanor offenses that have, as an element, the use of force, when the government can prove the existence of a domestic relationship between the offender and the victim, the rule of lenity has no role to play in this case. Contrary to the court of appeals' suggestion (Pet. App. 20a-22a), "[t]he simple existence of some statutory ambiguity * * * is not sufficient to warrant application of that rule." *Muscarello* v. *United States*, 524 U.S. 125, 138 (1998). And contrary to respondent's suggestion (Br. in Opp. 14-15), it is not sufficient that different courts have reached different conclusions on the meaning of the same statutory provision. *Moskal* v. *United States*, 498 U.S. 103, 108 (1990). Rather, the rule of lenity applies only if there is a "grievous ambiguity" in the statutory text such that, "after seizing everything from which aid can be derived," the Court "can make no more than a guess as to what Congress intended." *Muscar-*

ello, 524 U.S. at 138-139 (internal quotation marks and citation omitted).

There is no such "grievous ambiguity" here. Section 922(g)(9) unambiguously applies to a person who has been convicted of battering his or her spouse, regardless of whether the offense of conviction had, as an element, a domestic relationship between the parties. Resort to the rule of lenity is therefore unwarranted.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. 18 U.S.C. 922(g)(9) provides:

It shall be unlawful for any person—

* * * * *

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

2. 18 U.S.C. 921(a)(33) (2000 & Supp. V 2005) provides:

(A) Except as provided in subparagraph (C), the term "misdemeanor crime of domestic violence" means an offense that—

(i) is a misdemeanor under Federal, State, or Tribal law; and

(ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim

(B)(i) A person shall not be considered to have been convicted of such an offense for purposes of this chapter, unless—

(I) the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case; and

(II) in the case of a prosecution for an offense described in this paragraph for which a person was entitled to a jury trial in the jurisdiction in which the case was tried, either

(aa) the case was tried by a jury, or

(bb) the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise.

(ii) A person shall not be considered to have been convicted of such an offense for purposes of this chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

RESPONDENT'S BRIEF

No. 07-608

Supreme Court, U.S.
FILED
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In The
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

RANDY EDWARD HAYES,
Respondent.

On a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Section 922(g)(9) of Title 18, United States Code, makes it a crime for any person convicted of a "misdemeanor crime of domestic violence" to possess a firearm. The question presented is whether, to qualify as a "misdemeanor crime of domestic violence" under 18 U.S.C. § 921(a)(33)(A) (2000 & Supp. V 2005), an offense must have as an element a domestic relationship between the offender and the victim.

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STATUTES AND OTHER PROVISIONS INVOLVED

Relevant statutory and regulatory provisions and other material are set forth in the appendices to this brief. App., *infra*, 1a-15a.

STATEMENT OF THE CASE

A. The firearms

Respondent Randy Edward Hayes and his longtime girlfriend, Misty Oldaker, live in Mannington, West Virginia.

In 2003, Ms. Oldaker bought three new .17-caliber Marlin rifles at Wal-Mart to give to their sons, once each became old enough to hunt. R.83 Sentencing Memorandum, p. 3. She later gave one to Mr. Hayes's father, a licensed gun dealer, and replaced it with a new .17-caliber Rossi rifle.

In early 2004 Ms. Oldaker and Mr. Hayes broke up; she moved out and asked for the two Marlins and the Rossi back. *Id.* at 2. Mr. Hayes arranged to return them at the Mannington Police Department so the exchange would be documented, and the handover took place without incident. *Id.* at 2-3. Later that year, the couple reconciled.

After his father died, Mr. Hayes arranged for the sale of the Marlin, still new in its box. J.A. 6, 9, 16; R.83 Defendant's Sentencing Memorandum, at 2. The buyer, Larry Orloff, traded it to a licensed firearms

dealer, who in turn sold it to a woman who gave it to her son as a gift. CA4 J.A. 144-145.

When Mr. Hayes was a boy of 9 or 10 in the mid-1970s, his father gave him a .30-30 Winchester hunting rifle. J.A. 9; CA4 J.A. 147. It never has been used for anything else. CA4 J.A. 186, 169. In 2004 the gun was stored, unloaded, in a case without ammunition beneath Mr. Hayes's bed; he referred to it as an "old rust bucket" and did not know if it still fired. *Id.*

Nothing in the record indicates that any of the rifles ever has been used illegally.

B. Police are sent to Mr. Hayes's house.

In 1994, Mr. Hayes pleaded guilty to a misdemeanor charge of battery under W. Va. Code Ann. § 61-2-9(c), relating to a November 1993 incident in which he struck his then-wife, Maryann Carnes, with his hand during an argument. He was given one year probation. J.A. 6; Pet. App. 2a; App. 6a. They later divorced.

On the evening of July 24, 2004, Mr. Hayes and Ms. Oldaker got into an argument over Mr. Hayes's decision that it was too late for his 11-year-old son to go outside. The boy phoned Ms. Carnes, his mother, around 10:30 p.m. CA4 J.A. 186. Ms. Carnes demanded that Mr. Hayes allow the boy to come to her home but Mr. Hayes refused, since that was contrary to the parenting-time schedule. R.83 Sentencing Memorandum, at 3. The call ended with Ms. Carnes threatening to send police to arrest Mr. Hayes. *Id.*

Ms. Carnes called 911 and reported that Mr. Hayes was threatening Ms. Oldaker with a gun. CA4 J.A. 186. That assertion, which she claimed to have been told by Ms. Oldaker, would later prove to be unfounded. *Id.* at 186-87; *also* J.A. 10. Ms. Carnes's report was the only mention of a gun being involved in the incident. CA4 J.A. 186.

Several deputies responded and found Mr. Hayes on the porch. R. 83, at 3. They asked him if there was a gun inside; he said no and consented to a search. Beneath Mr. Hayes's bed, unloaded and in its case without ammunition, deputies found the old Winchester. CA4 J.A. 186. Mr. Hayes was arrested and charged with misdemeanor domestic battery under W. Va. Code Ann. § 61-2-28(a), and obstruction under W. Va. Code Ann. § 61-5-17(a) for telling officers there was no gun. R.92, Sentencing Hearing DX 1.

Investigators found nothing to corroborate Ms. Carnes's allegation regarding use of a gun. CA4 J.A., 186. Responding deputies testified that the gun was in its case beneath the bed, no ammunition for it was found, and there was no physical evidence it had been used in any way. *Id.* at 186-87.

The domestic-battery charge ultimately was dropped. Mr. Hayes pleaded guilty to misdemeanor obstruction and was sentenced to the eight hours he spent in jail the night of his arrest. Guilty or No Contest Plea in *West Virginia v. Randy Hayes*, Marion County Magistrate's Court Case No. 04-M1171, App. 7a.

C. The United States investigates and charges Mr. Hayes with unlawful firearm possession.

One of the deputies who responded to the 911 call also was involved in Mr. Hayes's 1994 misdemeanor case, and after discovering the Winchester, police contacted the Bureau of Alcohol, Tobacco, Firearms and Explosives. An ATF agent met with deputies early on July 25 and immediately began investigating whether Mr. Hayes had violated the Gun Control Act of 1968, 18 U.S.C. 922(g)(9), which makes it a felony for anyone convicted of a "misdemeanor crime of domestic violence" to possess a firearm. J.A. 6.

ATF's investigation discovered Mr. Hayes's sale of the new rifle to Mr. Orloff and his return of the three new rifles to Ms. Oldaker at the police station. J.A. 5-11; CA4 J.A. 169-70. Mr. Hayes was indicted on three counts of possessing a firearm in violation of § 922(g)(9): Count I arose from the rifle sold to Mr. Orloff; Count II related to the guns returned at the police station, and Count III involved the Winchester given him as a boy. Superseding Indictment, J.A. 1.[1]

Mr. Hayes moved to dismiss the superseding indictment, asserting that his 1994 conviction was not a "misdemeanor crime of domestic violence" because W. Va. Code Ann. § 61-2-28(c) does not have as an element, a domestic relationship between the accused and the victim. App. 6a. The district court denied the motion. Pet. App. 33a. Mr. Hayes entered a conditional guilty plea to Count I (possession of the rifle sold to

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[1] Various court documents misspell Mr. Orloff's name as "Orloft."

Mr. Orloff), allowing him to appeal the denial of his motion under Fed. R. Crim. P. 11(a)(2). Order Following Plea Hearing, J.A. 12; *also* TR 7/5/05, CA4 J.A. 154. The remaining two counts were dropped.

The Government objected to the application of U.S. Sentencing Guidelines Manual § 2K2.1(b)(2) (2005), which provides for a sentence reduction when the defendant possessed the firearm(s) "solely for lawful sporting purposes or collection, and did not unlawfully discharge or otherwise unlawfully use such firearms or ammunition...." CA4 J.A. 185. After hearing testimony from Mr. Hayes, Ms. Carnes and two deputies who responded to the 911 call, the court found there was no evidence that Mr. Hayes used a firearm unlawfully, and applied the sporting-purposes reduction. CA4 Sealed J.A. 186-87.

While a violation of § 922(g)(9) is punishable by up to 10 years in prison and a $250,000 fine, 18 U.S.C. 924(a)(2); 18 U.S.C. 3571(b)(3), the court sentenced Mr. Hayes to five years' probation, including six months' home detention with an electronic tether. Judgment, CA4 J.A. 174.

D. The Fourth Circuit directs that the indictment be dismissed.

The Fourth Circuit reversed the denial of Mr. Hayes's motion, holding that his 1994 conviction was not for a "misdemeanor crime of domestic violence" as defined in 18 U.S.C. 921(a)(33)(A) because W. Va. Code Ann. § 61-2-9(c) has no domestic-relationship element. The court found that the text and structure of § 921(a)(33)(A) require that the predicate offense have

such an element. Pet. App. 5a-9a. It further held that the grammatical rule of the last antecedent supported that interpretation, and that Congress's use of the term "element" did not foreclose requiring both use-of-force and domestic-relationship elements. Pet. App. 9a-15a.

Nothing in the legislative history was inconsistent with that, the court held, noting that other courts improperly had focused only on statements by the bill's original sponsor. Pet. App. 15a-20a. Lastly, it found that even if the statute was ambiguous, the rule of lenity compelled Mr. Hayes's interpretation. Pet. App. 20a-22a. Over a dissenting opinion (Pet. App. 23a-32a), the court remanded for dismissal of the superseding indictment.

The Fourth Circuit denied the Government's petition for rehearing and rehearing *en banc*. Pet. App. 40a.

E. The gun-possession ban of 18 U.S.C. 922(g)(9)

1. Legislation is introduced to ban gun possession by anyone indicted for or convicted of domestic abuse.

In March 1996, New Jersey Sen. Frank Lautenberg introduced a measure to ban firearm possession by "anyone under indictment for, or [who] has been convicted in any court of, any crime involving domestic violence." S. 1632, 104th Cong., 2d Sess. 1 (1996), 142 Cong. Rec. at 5840, App. 5a. The bill defined that predicate offense as:

> a felony or misdemeanor crime of violence, regardless of length, term, or manner of punishment, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to the spouse, parent, or guardian of the victim under the domestic or family violence law of the jurisdiction in which such a felony or misdemeanor was committed.

Ibid. App. 4a. It was referred to the Senate Judiciary Committee, where it languished for months. (A similar measure in the previous Congress never made it out of committee. S. 1570, 103rd Cong., 1st Sess., (1993); 139 Cong. Rec. at 25,490).

With no hearing scheduled, Sen. Lautenberg in late July 1996 pulled the measure from committee and sought to add it to H.R. 2980, an anti-stalking bill. The Senate sponsor of that bill, Sen. Hutchison of Texas, realized the depth of House opposition to the ban and insisted on several amendments, including removal of its provision prohibiting gun possession merely upon indictment. 142 Cong. Rec. at 19,300-19,301 (statement of Sen. Hutchison); *Id.* at 19,394. After that provision was removed, the ban was joined to the anti-stalking bill and sent to the House. 142 Cong. Rec. at 19,300. It still defined the predicate offense as a "crime involving domestic violence."

The anti-stalking bill had been "universally supported." 142 Cong. Rec. at 20,995 (statement of

Sen. Lott). But within a week, opposition to the gun-possession ban in the House brought the combined bill to a standstill. On August 2, Sen. Hutchison lamented that "my bill is dying in the House right now because of the amendment...." 142 Cong. Rec. at 21,435; *see also id.* at 21,438-21,439. Sen. Lautenberg complained about House "extremists" blocking the measure. *Id.* at 21,437-21,438; 22,985. Opposition spilled back into the Senate, where the controversy held up eight judicial nominations, *Id.* at 20,996 (statement of Sen. Lautenberg), and House opponents tried to strip the ban from the anti-stalking bill. *Id.* at 21,436 (statement of Sen. Ford).

With her measure "bogged down," Sen. Hutchison demanded that the minority leader honor a prior agreement to remove the gun-possession ban. *Id.* at 21,435. Once the two were uncoupled, the anti-stalking measure easily received final legislative approval on September 10, and was signed into law as part of the National Defense Authorization Act for Fiscal Year 1997, Interstate Anti-Stalking Punishment and Prevention Act of 1996, Pub. L. No. 104-201, 110 Stat. 2422 (1996) (codified at 18 U.S.C. 2261, 2261A and 2262).

In early September, Sen. Lautenberg offered the gun-possession ban as an amendment to H.R. 3396, the Defense of Marriage Act, but it was tabled. 142 Cong. Rec. at 21,784.

As the end of September (and fiscal) 1996 neared, six of 13 appropriations bills needed to fund the Government for 1997 still had not passed. 142 Cong. Rec. at 25,814 (statement of Rep. Livingston). Running

out of legislative options, Sen. Lautenberg on September 12 offered his bill as an amendment to H.R. 3756, the $23.5-billion Treasury and Postal Service appropriations bill. *Id.* at 22,985 (statement of Sen. Lautenberg). It was identical to the version attached to the anti-stalking bill six weeks earlier, including its definition of "crime involving domestic violence," and the Senate approved its addition 97-2. *Ibid; see also id.* at 22,988. The Treasury and Postal Service bill eventually was folded into H.R. 3610, the Omnibus Consolidated Appropriations Act, along with the other remaining appropriations measures. 142 Cong. Rec. at 25,942; 26,045.

When the appropriations package entered conference committee, however, the ban again ran into staunch resistance. 142 Cong. Rec. at 25,001-25,002 (1996) (statement of Sen. Lautenberg). Sen. Lautenberg on September 25 complained that "behind closed doors, the Republican leadership has decided to entirely gut this legislation....the gun lobby is now intruding in the legislative process and emasculating this legislation. The NRA language, apparently being placed in the [conference report] would completely gut the protections in our amendment." 142 Cong. Rec. at 24,646. Four amendments offered by House conferees attempted to "water down" the bill, he charged, and were "little more than a sham...drafted cleverly by the gun lobby." *Id.* at 24,647. The following day, Sen. Lautenberg complained again about a continuing "determined effort to gut my proposal...." *Id.* at 25,001. He agreed to one of the proposed amendments; the others were withdrawn. *Id.* at 26,674-26,677.

2. The ban passes, but only after opponents rewrite its central definition on the final weekend of the 104th Congress.

In negotiations with House Republican leaders in the early hours of Saturday, September 28, proponents of the ban agreed to drop the definition of "crime involving domestic violence." In place of that, which had been part of the proposed legislation since its introduction, the current language of § 921(a)(33)(A) was inserted – re-labeling the predicate offense as a "misdemeanor crime of domestic violence" and defining it in the language giving rise to this dispute:

> an offense that—
>
> > (i) is a misdemeanor under Federal or State law; and
> >
> > (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim[.]

142 Cong. Rec. at 26,045 (App. 1a-2a); *see also id.* at 26,675 (statement of Sen. Lautenberg).[2] Of critical importance, Saturday, September 28, 1996 marks the first time that language was part of the bill.

The omnibus spending package was filed in both chambers that evening. The conference report accompanying H.R. 3610, H.R. Rep. No. 104-863 (1996), was "about a foot and a half long" and could give one a "double hernia lifting it." 142 Cong. Rec. at 25,851 (statement of Rep. Obey). The bill moved completely through the House in a little over three hours: it was filed before 7:00 p.m., debate began after 8:30, and by 10:15 it had passed 370-37, one member voting "present." 1996 House Journal at 2457, 2678; *see also* THOMAS online, "H.R. 3610 – Making appropriations for the Department of Defense for fiscal year ending September 30, 1997, and for other purposes," http://www.congress.gov/cgi-bin/bdquery/z?d104:HR03610:@@@L&summ2=m& (1996); 142 Cong. Rec. at 25,874.

The package's size and the haste in which it had to be considered sparked an outcry. One Representative called it "a case study in institutional failure because of the massive amount of somebody else's unfinished business that had to be attached to the appropriations legislation." 142 Cong. Rec. at 25,851 (1996) (statement of Rep. Obey). Another expressed outrage because "no one knows what is in this bill nor who put

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[2] As the Government notes (Br. 3 & n.1), the statute was amended in 2005 to add misdemeanors under tribal law.

it here," resulting in "proposals which have never been scrutinized." *Id.* at 25,870 (statement of Rep. LaFalce).

Not one Representative read and analyzed the entire bill before voting began, 142 Cong. Rec. at 25,873 (statement of Rep. Collins), and the gun ban was not discussed in any way during the one-hour House debate. After approving the spending package, the House adjourned for the 104th Congress, and Representatives went home. *Id.* at 25,866 (statement of Rep. Gingrich).

The Senate took up the omnibus appropriations bill on Monday, September 30, the last day to avoid a repeat of the previous October's Government shutdown. Senators knew that the bill "absolutely must be signed tonight," 142 Cong. Rec. at 26,614 (statement of Sen. Stevens), and it prompted similar complaints as in the House regarding their inability to review it fully – including its many non-appropriations provisions. *Ibid.* (statement of Sen. Byrd). Several Senators made floor statements, but only Sen. Lautenberg discussed the gun-possession ban. He downplayed the last-minute amendment forced into the measure as immaterial to its substance, saying that it perhaps had even "broadened" the ban. 142 Cong. Rec. at 26,674-26,677.

The Senate approved the package by voice vote and the President signed it into law that day. Treasury Department, Postal Service and General Government Appropriations Act, 1997, Pub. L. No. 104-208, Div. A, 110 Stat. 3009-314; Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110

Stat. 3009. Like the rest of the measure, the firearm-possession ban took effect immediately.

SUMMARY OF ARGUMENT

Domestic violence undeniably is a serious problem, one that in 1996 prompted some in Congress to seek to ban firearm possession by anyone convicted of misdemeanor assault against a family member or intimate. But while the original bill would have had the sweeping reach the Government advocates, the statute enacted was the product of legislative compromise, and imposes a ban of more limited scope. Section 922(g)(9) prohibits firearm possession only by those convicted of a misdemeanor containing a domestic-relationship element.

Everyday English usage, punctuation and grammatical rules support the Fourth Circuit's reading of "misdemeanor crime of domestic violence," as does the statute's drafting history. In contrast, the measure's scant legislative history is an extremely dubious indicator of its meaning, and the statement on which the Government and most courts have placed heaviest emphasis was not even made until after the House of Representatives had voted and adjourned.

The Government cannot establish its reading with sufficient clarity to avoid the rule of lenity, and thus the statute should be construed in favor of Mr. Hayes. If not, the Court should remand to allow Mr. Hayes to raise a Second-Amendment challenge in light of *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) – review that the Government's own *Amicus Curiae* brief suggests would be appropriate.

ARGUMENT

The statute's language, structure, history, and real-world effects confirm that it bans firearm possession only where the predicate offense contains a domestic-relationship element.

Section 921(a)(33)(A) as enacted reflects a congressional balancing of the Nation's longstanding tradition of lawful firearm possession by non-felons, with the growing awareness of the serious problem of domestic violence. The Government's contrary view takes undue liberties with the statutory language, overemphasizes the floor statement of a single lawmaker, and disregards that the final measure was the result of legislative compromise.

A. The most natural reading of the statute requires a domestic relationship as an element.

1. Common English usage aligns with the Fourth Circuit's interpretation.

Statutory text is a medium of communication. It conveys society's collective will, as expressed by legislative representatives, so people will know how they should behave and what consequences will attach to certain actions. 2A Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 45.01, at 5 (7th ed. 2007). Where a statute contains an explicit definition, this Court follows it. *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000). The Fourth Circuit correctly read § 921(a)(33)(A)'s definition of "misdemeanor crime of domestic violence" to require a

domestic-relationship element in the predicate offense. Pet. App. 4a-15a.

As the court noted, Congress structured § 921(a)(33)(A) as a statement of what is being defined (misdemeanor crime of domestic violence) followed by a parallel list of its two essential attributes. Pet. App. 7a. Clause (i) requires that the predicate offense be a misdemeanor under Federal or State (or, now, tribal) law. Clause (ii), meanwhile, requires that it have

> ...as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim[.]

18 U.S.C. 921(a)(33)(A)(ii) (2000 & Supp. V 2005), App. 1a-2a.

The most natural reading of that text requires both a use-of-force and a domestic-relationship element in the predicate offense. The ordinary speaker of American English would not read clause (ii) by placing a period after "deadly weapon" and cleaving away the rest of the wording, beginning with "committed by...," as the Government does. That arbitrarily truncates the definition to require only actual or threatened force as an element, and to exclude the remainder of the provision describing the domestic relationship.

No signal within clause (ii) (or anywhere else) alerts the reader that its statement of what is required as an element ends a quarter of the way through, after the fourth of the clause's 13 commas and 20th of its 79 words. Nor is there any indication that, from "committed by" forward, clause (ii) merely lists the types of offender-victim relationships that will elevate an offense into a "misdemeanor crime of domestic violence," regardless of whether that relationship was an element.

Everyday usage compels Mr. Hayes's reading of the statute. *See Lopez v. Gonzales*, 127 S. Ct. 625, 631 (2006) (rejecting Government's reading of "felony punishable under the Controlled Substances Act" to include State felonies, since "[r]egular usage points in the other direction").

2. Punctuation and structure confirm that Congress tempered the statute's reach.

Section 921(a)(33)(A)'s punctuation confirms the requirement of a domestic-relationship element. The Fourth Circuit properly deemed significant both Congress's placement of a semicolon at the end of clause (i), and its omission of a semicolon in clause (ii). A semicolon (or hard return) between "deadly weapon" and the "committed by" phrase in clause (ii) would have set off the latter and divided the text to read precisely as the Government suggests it now does, since semicolons "mark a more important break in sentence flow than that marked by a comma." *The Chicago Manual of Style* ¶ 5.89 (14th ed. 1993). Again, this is consistent with how everyday people read, speak, and understand English.

ATF's regulation implementing § 922(g)(9), and an evidentiary rule added to the *Manual for Courts-Martial* in 1999, illustrate this. In its regulation defining "misdemeanor crime of domestic violence," ATF restructured § 921(a)(33)(A)'s language in the exact manner the Fourth Circuit suggested: by using a hard return (and the marker "(3)") to segregate the domestic-relationship language ("committed by...) from the use-of-force component. App. 12a (27 C.F.R. 478.11 (2007); *see also* 63 Fed. Reg. 35,520 (1998). Likewise, Mil. R. Evid. 611(d), addressing remote court-martial testimony by a child, defines "domestic violence" as "an offense that has as an element the use, attempted use, or threatened use of physical force against a person and is committed by" someone in the same four types of relationships listed in § 921(a)(33)(A)(ii). App. 14a Exec. Order No. 13,140, §2b, 64 Fed. Reg. 55,118 (Oct. 12, 1999) (amending *Manual for Courts-Martial*, pt. III, §6 (1998)).

In both instances, drafters used the copulative conjunction "and" (along with a hard return and "(3)" in the ATF regulation) to sever the domestic-relationship description from the use-of-force component. Either formulation makes plain that a domestic relationship is not an element of the offense, but rather simply an "additional fact." *See The Chicago Manual of Style* ¶ 5.183 (15th ed. 2003). But Congress used neither.[3]

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[3] ATF's regulation in fact improperly exceeds the statute's text. Indeed, the Government concedes that ATF criminal regulations generally are unworthy of deference under *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *See United States v. Orellana*, 405 F.3d 360, 396 & n.63 (5th Cir. 2005) (*citing*

The Government's dismissal of the Fourth Circuit's citation to punctuation (Br. 16-18) misses the mark, since the court did none of the things the Government's cases decry. It did not rely exclusively on punctuation in its analysis, nor cite it as controlling, nor invoke it before construing the text, nor use it to defeat plain meaning. Rather, the court simply viewed punctuation as affirming the conclusion compelled by the statutory words – a practice even the Government concedes is "useful" as an interpretive guide. Br. 17 (*citing United States v. Naftalin*, 441 U.S. 768, 774 n.5 (1979)).

And while the Government urges the Court to disregard Congress's punctuation to reach the "true meaning of the statute" (Br. 18), that malleable interpretive practice has little to recommend it. *Dir., Office of Workers' Comp. Programs v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 135 (1995) ("the proposition that [a] statute...should be liberally construed to achieve its purposes" is the "last redoubt of losing causes"). The Fourth Circuit was spot-on in noting that, had Congress chosen to set apart the phrase "committed by" in a separate clause, the Government's reading would be plausible – but Congress did not. Pet. App. 9a.

The 2005 statute permitting warrantless arrests in Indian country, part of the Violence Against Women and Department of Justice Reauthorization Act of 2005, 25 U.S.C. 2803(3)(C) (Supp. V 2005), is not

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United States v. Gayle, No. 02-26673, 2003 U.S. App. LEXIS 26673 (2d Cir. 2003), *and amended*, 342 F.3d 89, 93-94 & n.4 (2004)).

"essentially identical" to § 921(a)(33)(A). Pet. Br. 18-19. The two differ fundamentally. In § 921(a)(33)(A), the "has, as an element" language is contained in clause (ii), one of the two component clauses that together constitute the definition of "misdemeanor crime of domestic violence." But in § 2803(3)(C)'s description of "offense," App. 11a, the "has, as an element" phrase is something required *in addition to* a "misdemeanor crime of domestic violence" (or three other listed non-felony violations) to trigger the statute – and "misdemeanor crime of domestic violence" is undefined. Equating § 921(a)(33)(A)'s definition of "misdemeanor crime of domestic violence" with the "has, as an element" clause of 25 U.S.C. 2803(3)(C) renders the latter a redundancy – a coffee with cream, with cream.

3. The "committed by" phrase modifies the statute's force requirement, rather than "offense," located 31 words distant.

The Fourth Circuit also correctly applied the rule of the last antecedent, which calls for a limiting clause or phrase ordinarily to be read as modifying the noun or phrase it immediately follows. *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003). Under that grammatical construct, Mr. Hayes's reading of § 921(a)(33)(A) makes sense – while the Government's does not.

The latter part of clause (ii), from "committed by" onward, is properly read to modify its immediate antecedent, "the use or attempted use of physical force, or the threatened use of a deadly weapon." Read in that fashion, the predicate offense must have among its elements not only one of the three types of force,

but also one of the specified types of domestic relationships between offender and victim.

The Government reads the "committed by" phrase as instead modifying "offense." Br. 21-22. But under the rule of the last antecedent, the lengthy distance between the two prevents that. *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 342-43 (2005) (rejecting as contrary to rule of last antecedent an interpretation that would have applied the "acceptance" requirement of 8 U.S.C. 1231(b)(2)(D)(vii) as a modifier to clauses (i) through (vi) of the provision, located 20 or more words before it).

The Government's own authority recognizes this. "Modifiers should come, if possible, next to the words they modify." William Strunk & E.B. White, *The Elements of Style* 30 (4th ed. 2000); *see also* Margaret Shertzer, *The Elements of Grammar* 47 (1986) ("subordinate clauses should be placed near the words they modify"). The Government's interpretation erects a 31-word buffer between "offense" and "committed by," forcing the reader to traverse all of clause (i) and a sizable portion of clause (ii) before alighting on the modifier for "offense":

> an offense that—
>
> (i) is a misdemeanor under Federal, State, or Tribal law; and
>
> (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the

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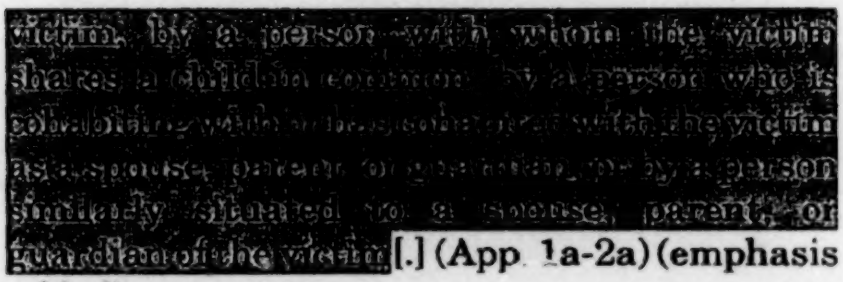

[.] (App. 1a-2a) (emphasis added).

Mr. White and Prof. Strunk doubtless would be surprised to see their imprimatur placed on such a "grammatically labored" reading of the statute. Pet. App. 11a-12a.[4]

For § 921(a)(33)(A) to have the meaning the Government advocates, Congress could have placed the "committed by" phrase immediately after "offense," to make clear that that is what it modifies, and moved the 31-word relative clause (subsections (i) and (ii)) to the end. That would define "misdemeanor crime of domestic violence" as:

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[4] The passage from which the Government distills its "relative clause exception" to the last-antecedent rule (Br. 21) states merely that interrupting a sentence's subject and its principal verb "is not usually bothersome when the flow is checked only by a relative clause or by an expression in apposition." Strunk & White, *supra* p. 20, at 29. Strunk & White then give an example of a relative clause separated from the noun it modifies by *five words*, a distance great enough to create ambiguity and thus require the relative clause to be moved forward, closer to the noun. *Id.* at 30.

Here, the Government's construction creates a 31-word interruption, one that is not just "bothersome," but which renders § 921(a)(33)(A) inscrutable.

an offense, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim, that—

(i) is a misdemeanor under Federal, State or tribal law; and

(ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon.

As the Government notes (Br 21), that construct undeniably makes the "committed by" phrase modify "offense." But that is because in that version, the two adjoin – consistent with the rule of the last antecedent.

In fact, the gun-possession ban as introduced would have had the sweeping reach its proponents sought. But that language also brought the bill, and every other piece of legislation it touched, to a standstill until it was removed in the early hours of September 28, 1996. The wording ultimately forced into the measure in the House and enacted as § 921(a)(33)(A)(ii) is significantly different, and there is no sound grammatical basis for skimming past the 30- (now 31-) word relative clause separating "committed by" from "offense."

The Government also asserts that "committed by" cannot modify the use-of-force requirement because it

is irregular English usage to say one "commits" a use or act of force (Br. 15). But that is not so. Courts use such language. *See, e.g.*, *Lankford v. Idaho*, 500 U.S. 110, 117 n.11 (1991) (quoting sentencing judge's finding that defendants "committed acts of force and violence" on the victims); *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476, 503 (1964) (framing issue as whether Ford made full payment "for the infringing use committed directly by Ford's purchasers and contributorily by Aro"); *Williams v. County of Scotts Bluff*, No. 7:05CV5018, 2005 U.S. Dist LEXIS, 31948, at **15-17 (D. Neb. Nov. 28, 2005) (plaintiff's allegation that county had "policy or custom of allowing deputy sheriffs to commit uses of excessive force" stated a claim under 42 U.S.C. 1983).

And even the Government, on the printed page, "commits" the "use of force." *See* Federal Bureau of Investigation, *Terrorism in the United States 1996* 3 (1996), *available at* http://www.fbi.gov/publications/terror/terroris.pdf (defining "international terrorism" in part as "...the unlawful use of force or violence committed by an individual..."). The Brief of Professors of Linguistics and Cognitive Science as *Amici Curiae* in Support of Neither Party argues persuasively that such wording is not at all uncommon, and provides many other examples. Br. 6-11 & App. 3a-12a. In everyday English usage, a person can indeed "commit" a "use of force."[5]

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[5] As used in § 921(a)(33)(A)(ii), "committed by" appears to be merely a pleonasm, a harmless verbal excess like "more preferable" or "continue to remain." H.W. Fowler, *A Dictionary of Modern English Usage* 455 (2d ed. 1965). "By" on its own would say the same thing, perhaps better: "has, as an element, the use

The rule of the last antecedent of course is not "inflexible and uniformly binding." Pet. Br. 20. Few rules are. But the yawning, 31-word gap that the Government's interpretation requires readers to leap, from "offense" to "committed by...," simply "stretches the modifier too far." *Jama*, 543 U.S. at 342. The Fourth Circuit's reading is the more natural.

4. Congress's use of "element" is consistent with requiring both domestic-relationship and use-of-force elements.

The Fourth Circuit also properly read "element" in § 921(a)(33)(A)(ii) as requiring both a force and a domestic-relationship element. Pet. App. 13a-15a. Standard English and other congressional enactments support its conclusion.

"Common usage in the English language does not scrupulously observe a difference between singular and plural word forms." Singer, *supra* p. 14, § 47.34, at 493. As the Fourth Circuit recognized, various statutes throughout Title 18 define an offense by combining the mode of aggression and some other factor – typically, its object – into a single "element," precisely as does § 921(a)(33)(A)(ii). Pet. App. 14a (*citing* 18 U.S.C. 16(a) and 18 U.S.C. 924(c)(3)(A)); *see also* 18 U.S.C. 373(a) (1994) (barring solicitation to commit a crime of violence, i.e. any conduct "constituting a felony that has as an element the use, attempted use, or threatened use of physical force

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or attempted use of physical force...*by* a current or former spouse..."). But "committed by" is not grammatically improper.

against property or against the person of another in violation of the laws of the United States); 18 U.S.C. 521(c)(2) (2000 & Supp. II 2002) (including among offenses barred by criminal street-gang statute "a Federal felony crime of violence that has as an element the use or attempted use of physical force against the person of another"); *accord* 18 U.S.C. 924(e)(2)(B)(i) (2006), 18 U.S.C. 3156(a)(4)(A) (1994 & Supp. IV 1998), and 18 U.S.C. 3559(c)(2)(F)(ii) (2006). Congress's frequent inclusion of multiple concepts within the term "element" in other criminal statutes, undercuts the assertion that "element" cannot encompass both the concepts described in clause (ii).

The Dictionary Act, 1 U.S.C. 1 (2000 & Supp. II 2002), also supports that outcome. In a Federal statute, unless context indicates otherwise, "words importing the singular include and apply to several persons, parties, or things." *Ibid.* The Government dismisses the Act as inapplicable, arguing that "Congress would not have used a singular noun to refer to multiple items in a list of purportedly conjunctive requirements." Br. 14 & n.3. Not so. As noted above, Congress often does that. Where the term "has, as an element" is followed by three force descriptors phrased in the disjunctive, then by four types of domestic relationships (also phrased in the disjunctive), the Government's insistence that "element" cannot include both groups is misplaced. The Dictionary Act's rule of construction applies, and "element" in clause (ii) must be read to encompass both a mode of aggression/force and a domestic relationship.

But even declaring "element" singular would not resolve in the Government's favor the relevant issue:

what, exactly, must the predicate offense outlaw? The Government's singular/plural "element" dichotomy is "not only unconvincing, but largely meaningless," because the relevant point "is not how many elements are involved, but what the singular element is." *United States v. Barnes*, 295 F.3d 1354, 1369 (D.C. Cir. 2002) (Sentelle, J., dissenting). Nor does it help to repackage the issue as determining which "attributes" Congress bundled into clause (ii) – that merely "begs the question of what single element-turned-attribute the statute requires. Just as an element might be either simple or complex and remain a single element, so might an attribute." *Id.* After all, labels alone do not control whether a thing is an "element." Pet. App. 14a (*citing Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000)).

A look at various pattern jury instructions describing a single criminal offense confirms this. For uttering or publishing a false document in violation of 18 U.S.C. 495's second paragraph, the Seventh Circuit's pattern instruction lists five elements, while the Eighth and Eleventh circuits group the same factors into only three. Pattern Criminal Federal Jury Instructions for the Seventh Circuit, 18 U.S.C. 495 (Uttering or Publishing a False Document—Elements), at 147 (1999); Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, 6.18.495B, Uttering a Forged Writing (18 U.S.C. 495), at 158 (2008); Eleventh Circuit Pattern Jury Instructions (Criminal Cases), No. 81.2, at 159-163 (2003).

For a charge under 18 U.S.C. 111(b) of forcibly assaulting, resisting, or otherwise interfering with a

Federal officer engaged in official duties, with the aggravating factor of either a deadly weapon or bodily injury, the Fifth Circuit pattern instruction describes four elements, while the Ninth Circuit's uses only three. Fifth Circuit Criminal Jury Instructions, No. 2.09 (2001); Ninth Circuit Manual of Model Criminal Jury Instructions, No. 8.2 (2003). The Eighth Circuit's fluctuates between three or four, depending on the aggravating factor involved. 8th Cir. Model Criminal Jury Instructions 6.18.111, at 134-36. And another tells jurors that the crime has five "essential" elements. 2 Kevin F. O'Malley, Jay E. Greinig & Hon. William C. Lee, *Federal Jury Practice and Instructions–Criminal* § 24.06, at 63 (5th ed. 2000). Plainly, there is nothing talismanic about either the word "element" in Title 18, or the manner in which an offense's "attributes" are assigned among them.

The Government itself has defined "element" with sufficient breadth to include the domestic-relationship component. A 2007 OLC memorandum opinion interpreting the force aspect of § 921(a)(33)(A)(ii) defines "element" as "the factual predicates of an offense that are specified by law and must be proved to secure a conviction. If conviction of a given offense can be secured without proof of a certain fact, then that fact is not an element of that offense." *When a Prior Conviction Qualifies as a "Misdemeanor Crime of Domestic Violence,"* 31 Op. Off. Legal Counsel 3 (2007) (citations omitted). A conviction under § 922(g)(9) cannot be secured without proving a domestic relationship in the underlying assault. Under OLC's definition, such a relationship is an "element" of the predicate offense.

B. The drafting and legislative histories show that the predicate-offense definition was restricted as part of a congressional compromise.

The statute's drafting history in Congress fully supports the Fourth Circuit's view. The Government (Br. 27-34) ignores that the ban was stymied in the House of Representatives until its original broad definition of the predicate offense was replaced at the eleventh hour with the term "misdemeanor crime of domestic violence" and the "has, as an element" wording. Only then did Representatives relent and approve the bill.

Legislative history – lawmakers' pre-enactment statements about a bill – in no way undercuts that view. Sen. Lautenberg's September 30, 1996 floor statement, the only one addressing the language at issue, is of suspect reliability as an analytical tool, and even the Government elsewhere has criticized it. Of greater significance, it can shed no light on what half of Congress understood about the gun-possession ban: House members had voted on the bill two days earlier, and gone home.

1. The ban languished in the House of Representatives until its original broad wording was limited via compromise.

Mr. Hayes fully agrees with the Government that the legislation's original purpose was to prohibit firearm possession by anyone convicted of using or threatening force against a spouse, child or other intimate. Pet. Br. 22. There simply is no denying that

Sen. Lautenberg and like-minded colleagues had that goal. But the flaw in the Government's argument, as its reliance on a September 12, 1996 floor statement reveals (*Ibid.*), is that as long as the bill contained the sweeping predicate-offense definition that would have accomplished that end, it was a legislative pariah. Only when "crime involving domestic violence" was replaced with the more limited phrase "misdemeanor crime of domestic violence" did the measure finally win House approval.

For nearly its entire existence in Congress, the bill's predicate-offense definition did not suggest, much less require, a domestic-relationship element. It did not even contain the word "element." 142 Cong. Rec. at 5840; App. 4a. Plainly, Sen. Lautenberg and other Senate supporters intended to ban gun possession for anyone using, or who was charged with using, force against a person in one of the listed domestic relationships. *Ibid.*

That was not lost on opponents in the House, who bottled up the bill from the moment it arrived. When Sen. Lautenberg pulled his proposal from committee and attached it to the anti-stalking bill, it brought that measure to a halt. The Government's claim that the two were decoupled "[w]hen the anti-stalking legislation stalled in the House" (Br. 28), papers over a key detail: the controversial gun-possession ban was the very reason the anti-stalking measure bogged down, as sponsors of each acknowledged. 142 Cong. Rec. at 21,435 (statement of Sen. Hutchison); *Id.* at 21,437-21,438 (statement of Sen. Lautenberg). The statement that "the House's failure to act on the [anti-stalking] bill had nothing to do with the language in

the Lautenberg Amendment," brief *Amicus Curiae* of Senators Lautenberg, Feinstein, and Murray 15, is inaccurate.

The bill drifted for weeks before finally being joined to the omnibus spending package. But even within that legislative haystack it remained a target, with efforts to "emasculate" and "gut" it continuing into the final days of the 104th Congress in late September.

In the early hours of September 28, opponents forced the removal of "crime involving domestic violence" – as the bill's backers admit, due to concerns over its breadth. Brief *Amicus Curiae* of Senators Lautenberg, Feinstein and Murray 17. In its place was inserted the markedly different phrase "misdemeanor crime of domestic violence," written to require the predicate offense to "have, as an element" both a use of force and a domestic relationship. It was drafted at least in part by House Republicans, the very "extremists" Sen. Lautenberg accused of doing the bidding of the "gun lobby" in trying to "water down" the legislation, through "clever" loophole drafting. 142 Cong. Rec. at 26,675, 24,647. Only after that substitution did the bill win House approval, hours later.

Comparison of the text before and after that midnight session confirms that the compromise intentionally limited the bill's reach. On September 27, the bill defined the predicate offense as

> **a felony or misdemeanor crime of violence, regardless of length, term, or manner of punishment**, committed by a current or former

> spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to the spouse, parent, or guardian of the victim **under the domestic or family violence law of the jurisdiction in which such a felony or misdemeanor was committed** (App. 4a) (emphasis added).

Opponents of the gun-possession ban no doubt feared that the final clause (bolded) would be read as pertaining to the domestic-relationship language immediately preceding it ("committed by a current or former spouse..."), rather than the opening words of the passage (also bolded). That reading, which would be consistent with the rule of the last antecedent, would permit prosecution of anyone convicted under a general misdemeanor assault statute – such as Mr. Hayes.

But the September 28 compromise completely rewrote that provision, establishing separate subsections (i) and (ii), inserting at the beginning of the latter the "has, as an element" introduction, and then including *both* the use-of-force and domestic-relationship descriptions after it. Subsection (ii) thus became a self-contained passage listing the elements that the predicate offense must contain: force and a domestic relationship.

an offense that—

> (i) is a misdemeanor under Federal or State law; and
>
> (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim[.] (App. 1a-2a).

Where a key statutory term springs from congressional compromise between groups with divergent interests, courts must respect and give effect to that compromise. *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 93-94 (2002). In *Ragsdale*, this Court noted that Congress provided up to 12 weeks' unpaid leave in the Family and Medical Leave Act as a middle ground between employers, who sought less, and employees, who wanted more. 535 U.S. at 93. So too, here: supporters wanted to outlaw firearm possession by anyone committing any misdemeanor use of force against a family member or intimate. Opponents wanted no ban at all, or at most a "gutted" one.

Congress settled on a compromise, banning gun possession only by those convicted of violating specific domestic-abuse misdemeanor statutes.

2. The scant legislative history cannot support the Government's reading.

Where legislative history has any relevance, it is not to reflect a general understanding of a bill's meaning. Rather, it is grounded on the theory that other lawmakers who heard the comments presumably voted with the same understanding.

There is no House legislative history of the language at issue. There were no hearings, and in the one-hour House debate on the omnibus appropriations package September 28 (142 Cong. Rec. at 25,814-25,874), no Representative mentioned either the bill in general or the specific term "misdemeanor crime of domestic violence" substituted hours earlier – despite having five days to revise and extend remarks. *Id.* at 25,814 (statement of Rep. Livingston). Sen. Lautenberg's September 30 floor statement, on which the Government and several courts rely heavily (Br. 29-32), came two days *after* Representatives had voted and gone home. It cannot possibly illuminate what any Representative understood. *See United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 313-15 (1956) (dictum) (colloquy between two Senators as to suggested meaning disregarded in part because House already had passed the measure, and nothing in House proceedings indicated that that meaning should be given).

This is no mere technicality or quirk of timing. In contrast to the Senate, the House vehemently opposed the bill in all its earlier versions, and relented only when the current wording was substituted on September 28. The lack of legislative history germane

to half of Congress is fatal to the Government's attempt to rely on any such material.

Though there is legislative history in the Senate, it largely is irrelevant. Floor statements predating September 28 – such as that of September 12, in which the Government fixes the statute's purpose, Br. 22 – speak to a fundamentally different bill, whose predicate-offense definition did not reach the President's desk. They can show neither the enacted statute's meaning nor its purpose. *United States v. Granderson*, 511 U.S. 39, 49 (1994) (legislative declarations that do not address the meaning of the provision at issue cannot reflect Congress's purpose) (citations omitted). At most, they highlight the depth of House opposition to the original wording.

Nor can Sen. Lautenberg's September 30 floor statement, the only comment discussing "misdemeanor crime of domestic violence," support the weight placed on it by the Government and various courts. The Government exalts it by calling Sen. Lautenberg "the author of [the] operative language" (Br. 32), but the final definition resulted from bipartisan negotiations – as even he admitted. 142 Cong. Rec. at 26,675. The phrase "misdemeanor crime of domestic violence," like success, had many parents, and no one lawmaker's view of it is entitled to added weight.

More fundamentally, the statement's context seriously undermines its reliability. Legislative materials give their authors "both the power and the incentive to attempt strategic manipulations of legislative history to secure results that they were unable to achieve through the statutory text." *Exxon*

Mobil Corp. v. Allapattah Svcs., Inc., 545 U.S. 546, 568 (2005). When he rose to speak, Sen. Lautenberg had just completed a bruising, six-month legislative battle. Stymied at every turn, having seen various deals fall apart, supporters had secured a gun-possession ban only by agreeing in the waning hours of the 104th Congress to rewrite its central provision. The House voted on the substitute language hours later, without debating it, and neither chamber held any hearing, on any version of the bill. The Senator thus would have been acutely aware of both the need to bolster the new language, and the wide latitude he would have to do so: few of his colleagues were likely to engage in a serious floor colloquy, having twice voted overwhelmingly for the broad original measure. The floor statement thus is an even less-reliable source of meaning than the two-lawmaker exchange disregarded in *McKesson & Robbins*, *supra* – the legislative equivalent of one hand clapping.

The floor statement's content cautions further against its use. Sen. Lautenberg ascribed the new definition to critics concerned that its predecessor could outlaw firearm possession merely for "cutting up a credit card with a pair of scissors." 142 Cong. Rec. at 26,675. But the original wording (App. 4a) plainly required both a "crime of violence" and a human "victim," and no reasonable reading could stretch it to reach the slicing up of a Master Card – even when done to instill fear. Likewise suspect was the assertion that the new definition was "probably broader" than the original, 142 Cong. Rec. at 26,675. "Extremists" seeking to "gut" a bill do not broaden its central provision. In the end, the accurate view is the

admission that the new language was "more precise." *Ibid.*

Interestingly, the Government itself has viewed the September 30 floor statement dismissively. *See* OLC Opinion 12 & n.4 (final language enacted was a compromise between competing interests, and reliance on it would give lawmakers the power and incentive to strategically manipulate legislative history) (*citing Exxon Mobil*, 545 U.S. at 568)). In discussing the amended language "for the historical record" (142 Cong. Rec. at 26,674), it seems likely that the Senator was speaking not to his colleagues, so much as to the justices of this Court, 12 years later.

An alternate possibility is that the September 30 floor statement was simply mistaken – that House negotiators snookered proponents into accepting a more limited ban than they realized. Congressional logrolling is tricky business, after all, especially when the log contains $800 billion and the rolling is done in the wee hours before a looming Government shutdown.

It is questionable whether legislative history should ever be relied on to impose criminal liability. *See United States v. R.L.C.*, 503 U.S. 291, 311-12 (1993) (Thomas, J., concurring). But leaving that aside, such material is at its most tenuous when it relates to a politically controversial statute (though it still may be helpful if sufficiently comprehensive). *See* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. Cal. L. Rev. 845, 856-74 (1992). Thus, while the Urban Mass Transportation Act's legislative history informed judicial resolution of a preemption issue, that history contained 1) a cabinet

member's hearing testimony stating the views of his department and of key stakeholders; 2) a floor colloquy on the precise issue between Senators for and against the bill; and 3) correction of a misstatement during the floor debate so the legislative record would be accurate. *Id.* at 856-58, 872 n.71. And it dealt with a civil statute – not criminal liability.

The legislative history of the gun-possession ban consists only of the September 30 floor statement, which bears no resemblance to any of those materials. Relying on it to convey the statute's meaning or purpose, and to impose criminal liability, is the abuse of legislative history, not its use.[6]

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[6] The brief *Amicus Curiae* of Senators Lautenberg, Feinstein and Murray should be disregarded not only because legislators' post-enactment views should not be considered when interpreting the statute, 2A Singer, § 48.20, at 628 (7th ed. 2007), but because "as time passes memories fade and a person's perception of his earlier intention may change." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980).

Twelve years removed from events, the brief categorically states that the gun-possession ban had "nothing to do with" the anti-stalking measure stalling in the House (Br. 15), when Sen. Lautenberg at the time linked the two directly. 142 Cong. Rec. at 22,985. It relies heavily on pre-September 28 floor statements. Br. 10-12, 14, 15 n.5, 20-21. And it draws from silence in the legislative record to assert that the "as an element" language was added not to require a domestic-relationship element, but to confine the predicate misdemeanor to offenses involving use, attempted use or threat of physical force. *Id.*, pp. 12-13.

3. Courts that follow the Government's view failed to consider the drafting history and misused legislative history.

The Government trumpets the number of courts sharing its reading (Br. 15-16), but none of them acknowledged the gun-possession ban's rocky reception and complete lack of legislative history in the House. None discussed the last-minute, compromise nature of the key amendment. And none considered that the September 30 floor statement may have been deliberately crafted to repackage as victory a significant legislative setback.

Early decisions simply quote the floor statement without acknowledging its deficiencies.[7] Later ones reference the prior rulings, essentially substituting string-cite for legislative analysis.[8] Some misread the legislative record: *White v. Dep't of Justice*, 328 F.3d 1361, 1366 n.1 (Fed. Cir. 2003) erroneously deems Sen. Lautenberg "the author of the disputed language" en route to giving his September 30 comments dispositive weight. And the *Barnes* majority, after noting "context is everything," divines the statute's purpose from the September 12 floor statement discussing a failed prior version. 295 F.3d at 1360, 1364 (*quoting* 142 Cong.

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[7] *United States v. Smith*, 171 F.3d 617, 620 (8th Cir. 1999); *United States v. Meade*, 175 F.3d 215, 219 (1st Cir. 1999).

[8] *United States v. Chavez*, 204 F.3d 1305, 1313-14 (11th Cir. 2000); *United States v. Kavoukian*, 315 F.3d 139, 142-44 (2d Cir. 2002); *United States v. Shelton*, 325 F.3d 553, 561-62 & n.12 (5th Cir. 2003); *White v. Dep't of Justice*, 328 F.3d 1361, 1365-67 (Fed. Cir. 2003) ("[p]etitioner offers us no reason why the consistent interpretation of these other five circuits is incorrect").

Rec. S10377-78 (Sept. 12, 1996)). One court relies heavily on the defendant's concession,[9] while another forgoes the September 30 statement entirely – in favor of the statute's grammar and syntax, as interpreted "by all seven of our sister circuits to have spoken on the issue."[10]

The Fourth Circuit's legislative analysis (Pet. App. 5a-22a) stands in clear contrast. Alone, it heeded this Court's directive to consider history from introduction to passage. *Id.* at 15a (*citing Regan v. Wald*, 468 U.S. 222, 238 (1984)). It properly disregarded pre-September 28 floor statements, and declined to let the September 30 statement supplant the text Congress enacted. *Id.* at 15a-22a; *see also Barnes*, 295 F.3d at 1368-70 (Sentelle, J., dissenting); *White*, 328 F.3d at 1373-74 (Mayer, C.J., dissenting).

Consistency in case law is unpersuasive where the decisions contain little discussion and/or simply rely on perfunctory prior opinions. *Poleto v. Consol. Rail Corp.*, 826 F.2d 1270, 1278 (3d Cir. 1987), *disapproved of on other grouds, Kaiser Aluminum & Chem. Co. v. Bonjorno*, 494 U.S. 827 (1990). Nearly every circuit court to adopt the Government's reading found support in the September 30 floor statement – and completely ignored both the context from which it arose, and the history of House intransigence. To render someone a

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[9] *United States v. Heckenliable*, 446 F.3d 1048, 1052 n.9 (10th Cir. 2006).

[10] *United States v. Belless*, 338 F.3d 1063, 1065-67 n.6 (9th Cir. 2003).

felon based on such material is to revive the whim and caprice that inspired Magna Carta.

4. The Government's other authority is unpersuasive.

Post-enactment views of those involved with legislation are not part of legislative history. Singer, *supra* p. 14, § 48.16, at 619. The 1999 House Judiciary Committee Report on which the Government relies, H.R. Rep. No. 105-845, at 88 (1999) (Pet. Br. 32) is even further outside the pale: the product of a committee that never held hearings on the bill, in a subsequent Congress that never voted on it.

Congressional inaction over the past decade also lends the Government no support. Br. 33-34; Br. *Amicus Curiae* Brady Center to Prevent Gun Violence 35-37. As an interpretive doctrine, legislative acquiescence is at most an auxiliary tool reserved for ambiguous statutes. *Jones v. Liberty Glass Co.*, 332 U.S. 524, 533-34 (1947) (citation omitted). When it is employed, this Court typically credits congressional inactivity only regarding its own decisions. It does not expect Congress to fix every circuit-court mistake, *Jones*, 332 U.S. at 533-34, and certainly not those of ATF. Pet. Br. 33-34. Moreover, it generally requires a jurisprudential lineage far greater than exists in this case. *Cf.*, *Monessen Sw. Ry. Co. v. Morgan*, 486 U.S. 330, 338-39 (1988) (legislative inaction persuasive where courts ruled with virtual unanimity for seven decades, and Congress amended statute many times over 80 years without addressing issue). Here, the Government invokes the doctrine based on a handful of technical amendments and a seven-year-old line of

cases, whose incomplete analysis is coming under increasing question – as the Fourth Circuit and the various dissenting circuit opinions show.

Given the uproar that ensued the first time Congress legislated at the confluence of these two areas of intense public interest (domestic abuse and gun control) its decision not to revisit the issue is unremarkable. Nothing meaningful can be gleaned from that inaction.

C. The rule of lenity requires dismissal of the superseding indictment.

After all interpretive means are exhausted, the Government's reading of § 921(a)(33)(A) cannot be adopted without guessing what Congress intended. This is a quintessential case for applying the rule of lenity.

The rule rests on society's "instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." *R.L.C.*, 503 U.S. at 305 (*quoting United States v. Bass*, 404 U.S. 336, 344 (1971) and H. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in *Benchmarks* 196, 209 (1967)). It is premised on the twin notions that fair warning should be given, in language the common world will understand, of what the law intends to do if a certain line is passed, and that legislatures, not courts, should define criminal activity. Pet. App. 21a (*quoting Babbitt v. Sweet Home Chapter of Comtys. for a Greater Or.*, 515 U.S. 687, 704 & n.18 (1995)).

This statute fails both tests. Even the Government's authority derides it as "not a model of clarity or preciseness," *Heckenliable*, 446 F.3d at 1050; *accord Barnes*, 295 F.3d at 1356. A law that requires citizens and courts to consult style manuals and linguistic experts to divine its meaning, or weigh the rule of the last antecedent against restrictive relative clauses, neither draws a line "in language that the common world will understand" nor prevents judges from becoming lawmakers.

The rule's "fair warning" rationale is particularly appropriate for statutes criminalizing conduct that is not *malum in se*. 3 Norman J. Singer, *Statutes and Statutory Construction* § 59:3, at 143-44 (6th ed. 2001). While most murderers and robbers give little forethought to statutory text, "in the case of gun acquisition and possession it is not at all unreasonable to imagine a citizen attempting to steer a careful course between violation of the statute and lawful conduct." *Bass*, 404 U.S. at 348 n.15 (citations, internal brackets and quotation marks omitted). Had § 921(a)(33)(A) so obviously outlawed firearm possession by Mr. Hayes, he likely would have chosen some means of returning Ms. Oldaker's guns other than asking a police officer to supervise the handoff at the stationhouse.

The contrast in potential outcomes facing Mr. Hayes also supports application of the rule. If lenity is "particularly appropriate" where a conviction will form a predicate offense leading to additional penalties under other statutes, *Pasquantino v. United States*, 544 U.S. 349 (2005) (Ginsburg, J. dissenting), it is even more fitting where the statute would criminalize what

otherwise appears to be constitutionally protected conduct. *Heller*, 128 S.Ct. at 2797-2798. Under Mr. Hayes's interpretation of § 921(a)(33)(A), he was delivering his late father's rifle to a friend who was buying it, something citizens have done since before the Revolution. Under the Government's interpretation, he was committing a felony.

Mr. Hayes is not arguing that Congress cannot regulate firearms. But if it wants citizens to forfeit their Second-Amendment rights upon conviction of a misdemeanor whose elements do not include a domestic relationship, it should say so more clearly than it has in § 921(a)(33)(A).

The Government asserts the strictest version of lenity (Br. 37), under which the rule applies only if "after seizing everything from which aid can be derived" the Court "can make no more than a guess as to what Congress intended." *Muscarello v. United States*, 524 U.S. 125, 138-39 (1998). More recently, this Court noted that "[w]hen there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *Scheidler v. Nat'l Org. For Women, Inc.*, 537 U.S. 393, 409 (2003) (citation omitted). Regardless of which is used, Mr. Hayes must prevail.

The statute's text, history, and structure plainly support Mr. Hayes's reading.[11] Even if the same could

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[11] The Government errs in advocating review of the statute's text, history, and "purpose" prior to invoking lenity (Br. 37). This Court looks to text, history, and structure. *Granderson*, 511 U.S. at 54.

be said for the Government's (which it cannot), the resulting equipoise, under *Scheidler*, ends the inquiry.

Muscarello yields the same result. Drafting history cannot support the Government's conclusion that the broad wording introduced in March 1996 made it through Congress. The legislative history is meager, at best – and wholly irrelevant to the House. The Government may disagree with Mr. Hayes's description of the September 28 negotiations and its result, but it can point to nothing in the legislative history that says things did not happen that way – just as it can point to nothing supporting an alternate explanation.

Lastly, this Court has read with leniency other statutes passed under remarkably similar circumstances. *See Granderson*, 511 U.S. at 51-52 n.9 (late substitution inserted as a floor amendment, without any conference report or close inspection, into a complex, phone-book size bill and subjected to middle- of-the-night debate with Congress anxious to adjourn for elections); *Bass*, 404 U.S. at 344 (last-minute Senate amendment to a long and complex bill that "was hastily passed, with little discussion, no hearings, and no report").

If the rule of lenity is premised on the idea that fair warning should be given, in language "the common world will understand," this case is tailor-made for its application.

D. Mr. Hayes's reading is consistent with the statute's aims.

The Government describes a variety of practical difficulties it fears the Fourth Circuit's interpretation will create. Br. 22-27, 34-37. But its concerns do not stand up to close inspection, and in any event would be for Congress to rectify.

1. Congress reasonably could have intended, through its compromise, to give States an incentive to enact domestic-violence assault laws.

In the Government's view, Mr. Hayes's interpretation requires the belief that Congress intended to impose a "dead letter" on the two-thirds of States that in 1996 lacked a domestic-violence statute. Br. 22-25. But Congress more likely was serving the twin goals of compromising between competing interests (by narrowly targeting the reach of a novel criminal prohibition), and giving States without a domestic-abuse law an incentive to enact one. Even adherents to the Government's reading suggest Congress may have had such a motive. *Belless*, 338 F.3d at 1067.

No one disputes that domestic violence is a serious and pervasive problem. Presumably, that is why States have begun enacting domestic-abuse laws – because they are more effective at curbing and/or punishing such behavior than are general assault statutes. By the Government's own tally, since 1996 there has been a 60-percent increase in the number of States with such laws – from 17, to 27. Br. 22-24 & nn.

8-9. To deem it "unlikely" that Congress intended such a result, *Id.* at 25, requires the jaded viewpoint that things rarely work out as Congress intends them.

In limiting the ban's reach via the September 28 amendment, Congress also could have been respecting limits on its own lawmaking authority. It might reasonably have determined that, if a State did not take domestic violence seriously enough to enact its own domestic-assault statute, there was no reason to let it avail itself of the Federal firearm-possession ban.

2. The Fourth Circuit's reading negates no part of the statute.

Requiring a domestic-relationship element does not render meaningless the word "Federal" in § 921(a)(33)(A)(i), as the Government claims. Br. 25. In Federal enclaves, the Assimilative Crimes Act (ACA), 18 U.S.C. 13, applies State law to actions that are "not made punishable by any enactment of Congress." 18 U.S.C. 13(a). It is a continuing adoption by Congress of the criminal laws of the State where each enclave is located, except those that have been preempted. *United States v. Sharpnack*, 355 U.S. 286, 294 (1958). In any State having a domestic-assault misdemeanor statute qualifying under § 921(a)(33)(A) – i.e., with a domestic-relationship element – such an offense committed on a Federal enclave is punishable under the ACA.

The Government's point that "no federal misdemeanor" has a domestic relationship among its elements (Br. 25) subtly but significantly blurs the statutory language. Section 921(a)(33)(A)(i) requires

the predicate offense to be a "misdemeanor under Federal...law," not a "federal misdemeanor." Since the ACA is a continuing adoption by Congress of certain State laws, under its own legislative authority, *Sharpnack*, 355 U.S. at 294, where it applies, it renders violation of State domestic-assault law a "misdemeanor under Federal law."

3. Requiring a domestic-relationship element also streamlines Brady Act enforcement.

The Fourth Circuit's interpretation also solves a practical problem regarding implementation of the Brady Handgun Violence Prevention Act, 18 U.S.C. 922(s)-(t). That Act requires law-enforcement officials to make a "reasonable effort" to ensure that would-be handgun purchasers are not prohibited from ownership by Federal law; in response the Attorney General established the National Instant Criminal Background Check System (NICS) within the FBI. Licensed dealers contact NICS to determine whether a transferee is prohibited from possession under Federal law. *See* 28 C.F.R. 25.1 & 25.3 (2006).

Under the Government's reading, where NICS's background check reveals a prior misdemeanor simple assault or battery, officials must investigate and make a determination whether, at the time of the offense, the purchaser and victim shared one of the relationships described in § 921(a)(33)(A)(ii). As Sen. Lautenberg acknowledged, that frequently will be a difficult, if not futile, task. 142 Cong. Rec. at 26,675.

But under the Fourth Circuit's interpretation, the issue will turn on the misdemeanor statute under

which the firearm purchaser was convicted. That bright-line test greatly simplifies Brady Act compliance, avoiding debate – years if not decades after the fact – about the purchaser's relationship with the victim, and other such issues. Pet. App. 19a-20a & n.11; *see also Belless*, 338 F.3d at 1067 (Congress could have intended to limit predicate offenses to those with a domestic-relationship element in part to avoid questions years later about the underlying offense).

Contrary to the intemperate predictions of some *Amici*, the Fourth Circuit's interpretation will not turn the Nation into a shooting gallery in which no spouse or peace officer is safe. In the first year of the gun-possession ban only 10 people were charged under it, a number that rose to 159 in 2000 before falling back to 125 in 2001. Tom Lininger, *A Better Way to Disarm Batterers*, 54 Hastings L.J. 525, 532 (2003). The number of those actually convicted is unknown, as is the subset from among that group whose predicate offense, like Mr. Hayes's, lacked a domestic-relationship element.

Mr. Hayes in no way intends to minimize the risk that domestic-violence calls pose to peace officers. But neither the Government nor its aligned *Amici* can show that the Fourth Circuit's reading will affect that risk in any appreciable manner.[12]

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[12] *Amicus Curiae* Brady Center misreads the data in asserting that there were 473,433 NICS denials in 2005, of which 60,237 (13 percent) were attributable to misdemeanor crimes of domestic violence. Br. 34 n.85 (*citing* National Instant Criminal Background Check Systems, Operations 2005 at 11, *available at* http://www.fbi.gov/hq/cjisd/nics/ops_report2005/ops_report2

4. The statute has a limited reach because Congress intended that.

The Government complains that the Fourth Circuit's interpretation will result in fewer individuals being covered by the gun-possession ban, but its grievance should be directed to Congress. For all but its last few hours in Congress, the predicate offense was described in a manner entirely consistent with what the Government seeks. App. 4a. It would have fulfilled supporters' intent to block all domestic-abuse misdemeanants from owning firearms. Pet. Br. 22. But it failed to muster enough votes.

"Adoption of an amendment is evidence that the legislature intends to change the provisions of the original bill." Singer, *supra* p. 14, § 48.18, at 623. The eleventh-hour amendment is strong evidence that that language was a compromise that limited the ban's reach. Certainly, it is evidence that lawmakers intended to discard that version to which the vast majority of the legislative history relates.

005.pdf). The cited NICS report shows those are aggregate figures for the seven-year period 1998-2005, not just for 2005. *Id.* at 4.

The Brady Center further ignores that those 473,433 denials represent fewer than 1.5 percent of all firearm transactions run through NICS in that seven-year period. *Id.* at 9. Indeed, the 60,237 denials for misdemeanor crimes of domestic violence represent only 0.19 percent of the 31.9 million total NICS-screened transactions in 1998-2005. And it is unknown how many of *those* were individuals rejected due to a conviction under a specific domestic-abuse statute – who will continue to be denied firearms, regardless of this Court's decision.

The respective consequences of an erroneous ruling also warrant consideration. If the Court affirms the Fourth Circuit but Congress indeed intended a broad gun-possession ban, Congress can rectify that easily by re-enacting the measure with clearer wording – Mr. Hayes and others like him will again be barred from possessing firearms. If, on the other hand, the Fourth Circuit gave the statute the limiting reading Congress intended, but this Court reverses, Mr. Hayes and others like him will have been rendered felons, contrary to Congress's wishes. For them, the harm will be irreparable, absent expungement or pardon.

There really is no dispute regarding the statute's original purpose – to ban firearm possession by those convicted of misdemeanor use of force against a family member or other intimate. But after protracted legislative struggle, Congress in the end decided the best and fairest way to serve that purpose was not by enacting the original proposed language. Rather, it settled on a more finely tuned definition of the predicate offense. Since 1996, those who want no gun-possession ban have tried to narrow it further and even repeal it, without success. Those who wish to broaden it, and restore the sweeping scope its proponents originally sought, are free to try the same.

E. If the Government's reading is adopted, this case should be remanded for review of the ban's constitutionality.

On June 26 this Court issued its decision in *Heller*, recognizing the right to bear arms as an individual one pre-existing the Constitution. The Court left further

clarification regarding the scope of that right for later cases. *Heller*, 128 S. Ct. at 2821.

Currently, this matter involves only the single issue of statutory interpretation on which certiorari was granted – briefing already had begun when *Heller* was decided. But *Heller* raises a serious issue as to whether 18 U.S.C. 922(g)(9) is constitutional. The opinion cites with approval various "longstanding" firearm regulations that presumably remain valid: bans on possession by felons or the mentally ill, or in schools and government buildings. 128 S. Ct. at 2816-17. But each is of a fundamentally different nature, and far more ingrained in society, than the restriction § 922(g)(9) imposed 12 years ago – without legislative comment, hearings, or debate on its key definitional provision.

The statute indeed appears to be without peer in requiring an individual to forfeit a right enumerated in the Bill of Rights, permanently, upon conviction of a misdemeanor.

The Government's own *Heller* brief supports remand for this inquiry. Where a law "directly limits the private possession of 'Arms' in a way that has no grounding in Framing-era practice, the Second Amendment requires that the law be subject to heightened scrutiny...." Brf. for the United States as *Amicus Curiae* 8 (citation omitted). Section 922(g)(9) limits private possession of arms in a way that has no grounding in Framing-era practice. Keeping an unloaded hunting rifle at home, the act that launched ATF's investigation, and possessing a new rifle in the course of delivering it to a buyer, the conduct for which

Mr. Hayes pleaded guilty, were ubiquitous practices in 1791. It would have been nearly unthinkable then for a person to forfeit permanently the right to possess firearms due to a misdemeanor assault, domestic or otherwise – domestic-abuse statutes were enacted precisely because of society's past refusal to take even the underlying assault seriously. Under the Government's own rationale, heightened scrutiny must be given this measure to determine its constitutionality.

Because this Court ordinarily does not decide in the first instance issues not addressed below, *NCAA v. Smith*, 525 U.S. 459, 470 (1999), it should remand for analysis of the constitutional issue, if it reverses. "Allowing lower courts to develop doctrines to address issues concerning the scope of the Second Amendment, its application to a variety of circumstances, and the relevance of particular historical materials has much to recommend it." Brf. for the United States as *Amicus Curiae* 29-30 (citation omitted).

CONCLUSION

The broad reading of the gun-possession ban espoused by the Government and the majority of circuit courts would be accurate, had the legislation originally introduced been enacted into law. But that measure failed to win passage. Instead, Congress passed and the President signed a compromise statute, banning firearm possession only for those convicted under a statute having, as an element, a domestic relationship between offender and victim – a specific domestic-abuse statute.

Statutory text and history show that the firearm ban of 18 U.S.C. 922(g)(9) applies only to those convicted of a misdemeanor containing a domestic-relationship element. Even if the Government could establish its contrary reading as plausible, the rule of lenity requires adoption of the Fourth Circuit's ruling. Its decision should be affirmed.

Alternatively, the Court should remand with instructions that Mr. Hayes be allowed to challenge the constitutionality of 18 U.S.C. 922(g)(9) in light of *Heller*.

Respectfully submitted,

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September 19, 2008

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APPENDIX

APPENDIX A

1. 18 U.S.C. 922(g)(9) provides:

> It shall be unlawful for any person—
>
> * * *
>
> (9) who has been convicted in any court of a misdemeanor crime of domestic violence,
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

2. 18 U.S.C. 921(a)(33) (2000 & Supp. V 2005) provides:

> (A) Except as provided in subparagraph (C),[2] the term "misdemeanor crime of domestic violence" means an offense that—
>
> (i) is a misdemeanor under Federal, State or Tribal[3] law; and

---

[2] So in original. No subparagraph (C) was enacted in subsec. (A)(33).

[3] So in original. Probably should not be capitalized.

(ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

(B)(i) A person shall not be considered to have been convicted of such an offense for purposes of this chapter, unless –

(I) the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case; and

(II) in the case of a prosecution for an offense described in this paragraph for which a person was entitled to a jury trial in the jurisdiction in which the case was tried, either

(aa) the case was tried by a jury, or

(bb) the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise.

(ii) A person shall not be considered to have been convicted of such an offense for purposes of

this chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

APPENDIX B

S. 1632, 104th Cong., 2d Sess. 1 (1996); 142 Cong. Rec. 5840 (March 21, 1996) provides:

S.1632

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. DEFINITIONS.

Section 921(a) of title 18, United States Code, is amended by adding at the end the following new paragraph:

"(33) The term 'crime involving domestic violence' means a felony or misdemeanor crime of violence, regardless of length, term, or manner of punishment, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim under the domestic or family violence laws of the jurisdiction in which such felony or misdemeanor was committed.".

SEC. 2. UNLAWFUL ACTS.

Section 922 of title 18, United States Code, is amended—

(1) in subsection (d)—
  (A) by striking "or" at the end of paragraph (7);
  (B) by striking the period at the end of paragraph (8) and inserting "; or"; and
  (C) by inserting after paragraph (8) the following new paragraph:
  "(9) is under indictment for, or has been convicted in any court of, any crime involving domestic violence."; and

(2) in subsection (g)—
  (A) by striking "or" at the end of paragraph (7);
  (B) in paragraph (8), by striking the comma and inserting "; or"; and
  (C) by inserting after paragraph (8) the following new paragraph:
  "(9) who is under indictment for, or has been convicted in any court, or [*sic*] any crime involving domestic violence.".

APPENDIX C

W. Va. Code § 61-2-9 (LexisNexis 1994) provides:

(c) Battery.

If any person unlawfully and intentionally makes physical contact of an insulting or provoking nature with the person of another or unlawfully and intentionally causes physical harm to another person, he shall be guilty of a misdemeanor, and, upon conviction, shall be confined in jail for not more than twelve months, or fined not more than five hundred dollars, or both such fine and imprisonment.

APPENDIX D

IN THE MAGISTRATE COURT OF MARION COUNTY, WEST VIRGINIA

Criminal Case No. 04M1171

Complaint Date: 7/24/04

STATE OF WEST VIRGINIA

v.

RANDY HAYES
Defendant

GUILTY OR NO CONTEST PLEA

1. The magistrate has informed me that I am charged with the offense(s) of *Obstructing an Officer* and that the possible penalties are: *$50.00 to $500.00 and / or up to 1 year (state mandatory minimum penalty, if any, and maximum penalty).* I understand the charge(s) and the penalties that the court may impose.

2. The magistrate has informed me that I have the right to be represented by an attorney at every stage of the proceeding, and that if I cannot afford to hire an attorney and I qualify, one will be appointed to represent me. I understand this right, and further understand that if I decide to represent myself I

cannot later claim that I was deprived of my right to be represented by an attorney.

DEFENDANT MUST INITIAL THE APPROPRIATE LINE:

____(a) I give up my right to have any attorney represent me.

REH(b) I have an attorney, who is present and is representing me.

____(c) I want to hire an attorney to represent me.

____(d) I want an attorney appointed to represent me.

NOTE: If I have initialed (c) or (d), I request that this plea proceeding be postponed so that I can talk with an attorney and have an attorney representing me for the rest of this proceeding.

3. The magistrate has informed me that I have the right to plead not guilty (or to maintain a plea of not guilty if it has already been made). I understand this right.

4. The magistrate has informed me that I have a right to be tried by a jury or by a magistrate without a jury, and at that trial I have the right to be represented by an attorney, the right to confront and cross-examine witnesses against me, the right not to be forced to incriminate myself, the right to call witnesses on my

own behalf, and the right to testify on my own behalf or to be silent. I understand these rights.

5. The magistrate has informed me, and I understand, that if I plead guilty or no contest I give up my right to a trial.

6. The magistrate has informed me, and I understand, that if I plead guilty or no contest, the court may ask me questions while I am under oath about the offense(s) to which I plead. I further understand that if I answer these questions under oath, my answers may later be used against me in a prosecution for false swearing.

/s/ Randy E. Hayes
Defendant's Signature
(Continued on next page)

7. The magistrate has informed me, and I understand, that the magistrate may neither entertain nor grant a request to withdraw this plea once the magistrate has accepted it.

8. I am entering this plea voluntarily, and not as a result of force or threats or of promises apart from a plea agreement. I have informed the magistrate of any prior discussions between the prosecuting attorney and me or my attorney that led to my willingness to plead guilty or no contest.

9. I plead as follows ***(initial one)***: *REH* guilty; ___ no contest.

11-17-04 */s/ Randy E. Hayes*

Date Defendant's Signature

(signed by counsel)
Counsel's Signature (if applicable)

I have addressed the defendant personally in open court and have informed the defendant of the matters set out above, and find that the defendant understands. I find further that the foregoing waiver of rights and plea are made knowingly and voluntarily by the defendant, and I accept the defendant's plea.

11/17/04 (signed by Magistrate)
Date Magistrate's Signature

Sentenced to 8 hours. Credit for time served of 8 hours. Witness fee $14.50, Process Fee $20.00, CC $123.50 = $158.00.

APPENDIX E

25 U.S.C. § 2803 (2000 & Supp. V 2005) provides:

The Secretary may charge employees of the Bureau with law enforcement responsibilities and may authorize those employees to—

* * *

(3) make an arrest without a warrant for an offense committed in Indian country if—

* * *

(C) the offense is a misdemeanor crime of domestic violence, dating violence, stalking, or violation of a protection order and has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent or guardian of the victim, and the employee has reasonable grounds to believe that the person to be arrested has committed, or is committing the crime;

APPENDIX F

27 C.F.R. 478.11 (1998) provides:

When used in this part and in forms prescribed under this part, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, terms shall have the meanings ascribed in this section.

* * *

Misdemeanor crime of domestic violence. (a) Is a Federal, State or local offense that:

(1) Is a misdemeanor under Federal or State law or, in States which do not classify offenses as misdemeanors, is an offense punishable by imprisonment for a term of one year or less, and includes offenses that are punishable only by a fine. (This is true whether or not the State statute specifically defines the offense as a "misdemeanor" or as a "misdemeanor crime of domestic violence." The term includes all such misdemeanor convictions in Indian Courts established pursuant to 25 CFR part 11.),

(2) Has, as an element, the use or attempted use of physical force (e.g., assault and battery), or the threatened use of a deadly weapon; and

(3) Was committed by a current or former spouse, parent, or guardian of the victim, by a person with

whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, (e.g., the equivalent of a "common law" marriage even if such relationship is not recognized under the law), or a person similarly situated to a spouse, parent, or guardian of the victim (e.g., two persons who are residing at the same location in an intimate relationship with the intent to make that place their home would be similarly situated to a spouse).

APPENDIX G

Exec. Order No. 13,140, §2b, 64 Fed. Reg. 55,115 – 55,118 (Oct. 12, 1999) provides:

Executive Order 13,140 of October 6, 1999

1999 Amendments to the Manual for Courts-Martial, United States

* * *

Sec. 2. Part III of the Manual for Courts-Martial, United States, is amended as follows:

* * *

b. Mil. R. Evid. 611 is amended by inserting the following new subsection at the end:

(d) Remote live testimony of child.

* * *

(2) . . . The term "domestic violence" means an offense that has as an element the use, attempted use, or threatened use of physical force against a person and is committed by a current or former spouse, parent, or guardian of the victim; by a person with whom the victim shares a child in common; by a person who is cohabiting with or has cohabited with the victim

as a spouse, parent, or guardian; or by a person similarly situated to a spouse, parent, or guardian of the victim.

REPLY BRIEF

Supreme Court, U.S.
FILED
OCT 20 2008
OFFICE OF THE CLERK

No. 07-608

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

RANDY EDWARD HAYES

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

No. 07-608

UNITED STATES OF AMERICA, PETITIONER

v.

RANDY EDWARD HAYES

ON WRIT OF CERTIORARI
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FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

Respondent contends that a "misdemeanor crime of domestic violence" under 18 U.S.C. 921(a)(33)(A)[1] must have, as an element, a domestic relationship between the defendant and the victim. That interpretation runs contrary to the text of the statute, its purposes, and its history. The statutory text mentions only one required "element" (the use or attempted use of physical force or threatened use of a deadly weapon) and separates that requirement from the domestic-relationship requirement with a comma. Moreover, respondent's interpretation would require this Court to ignore the ordinary meaning of the word "committed" and adopt the strained construction that a person "commits" a "use of physical force" or "use of a deadly weapon." That interpretation also would render the statute inapplicable in almost half the States, despite the fact that the statute

[1] As in the government's opening brief, citations in this brief to 18 U.S.C. 921(a)(33)(A) refer to the statute in its current form.

was enacted to address the nationwide problem of domestic violence involving firearms, and contradict the statute's drafting history.

Respondent hypothesizes a number of reasons why Congress might have wished to limit the firearm possession ban to predicate offenses with a domestic-relationship element. None is persuasive. He also speculates that the modification in the statutory language during the drafting process reflected a congressional compromise to exempt offenses without a domestic-relationship element from the statute's reach. But that modification concerned only the violence requirement of the predicate offense, not the domestic-relationship requirement. Likewise, there is no reason to invoke the canon of constitutional avoidance, because neither respondent nor his amici has identified any constitutional defect with the statute. Nor is there any basis for invoking the rule of lenity because, after all tools of statutory construction have been exhausted, there is no grievous ambiguity that would trigger that rule.

This Court therefore should reject respondent's interpretation and hold, in line with the overwhelming majority of courts of appeals, that an offense need not have a domestic-relationship element to qualify as a "misdemeanor crime of domestic violence" under 18 U.S.C. 921(a)(33)(A).

A. The Statutory Text Does Not Require That A Crime Have A Domestic-Relationship Element To Be A "Misdemeanor Crime Of Domestic Violence"

1. Respondent contends (Br. 15-16, 24-27) that an ordinary reader confronted with the words "has, as an element," followed by two clauses relating to the distinct concepts of mode of aggression and domestic rela-

tionship, would expect that both of those concepts are subsumed into one compound "element." That is incorrect. The statute identifies only one "element," which is defined by the clause immediately following that word: "the use or attempted use of physical force, or the attempted use of a deadly weapon." 18 U.S.C. 921(a)(33)(A)(ii). A comma then directs the reader to pause, *The Chicago Manual of Style* ¶ 6.18, at 244 (15th ed. 2003), and the next clause switches the reader's focus from the mode of aggression to the relationship between the aggressor and the victim.

Because "[t]he amount of force used and the relationship between the aggressor and the victim are two very different" concepts, an ordinary reader would understand them to constitute two different things, as opposed to a single element. *United States* v. *Belless*, 338 F.3d 1063, 1066 (9th Cir. 2003). Not surprisingly, in the States that have laws specifically addressing domestic violence, the mode of aggression and aggressor-victim relationship have routinely been treated as distinct offense elements.[2]

The structure of the domestic-relationship clause confirms that the singular "element" refers only to the mode of aggression. The clause is set off by a comma, which signifies that Congress finished defining the use of force "element" and turned to a new concept. See *The Chicago Manual of Style* ¶ 6.38, at 250; see also *United States* v. *Barnes*, 295 F.3d 1354, 1363 (D.C. Cir. 2002) (the comma "reinforces the separateness of the 'use of

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[2] See, *e.g.*, *State* v. *Robinson*, No. 8-08-05, 2008 WL 4377860, at *4 (Ohio Ct. App. Sept. 29, 2008); *State* v. *Roman*, No. 26359, 2008 WL 4173821, at *10 (Haw. Sept. 11, 2008); *State* v. *Coffin*, 191 P.3d 244, 248 (Idaho Ct. App. 2008); *People* v. *Pickens*, 822 N.E.2d 58, 65 (Ill. App. Ct. 2004); *State* v. *Rodriquez*, 636 N.W. 2d 234, 247 (Iowa 2001).

force' element from the 'committed by' language"). The domestic-relationship clause begins with the word "committed," which introduces that new concept and confirms a break from the previous clause. Had Congress intended to make the domestic relationship part of the required "element," one would have expected it to link the two clauses together, rather than insert a comma and a new verb to de-link them.

Respondent asserts that Congress "frequent[ly] inclu[des] * * * multiple concepts" in a single offense element, citing several statutes that define a "crime of violence" as a crime that "has as an element the use, attempted use, or threatened use of physical force against" the person or property of another. Resp. Br. 24-25 (citing 18 U.S.C. 16(a), 373(a), 521(c)(2), 924(c)(3)(A) and (e)(2)(B)(i), 3559(c)(2)(F)(ii)). The "crime of violence" definition stands in sharp contrast to the statutory language here, for two reasons. First, although Congress included the direct object of the force in defining a "crime of violence," it did not take the additional and unusual step of defining the identity of the aggressor in a single "element." Second, in defining a "crime of violence," Congress used the word "against" to connect the force used with its object and did not separate the two with any punctuation. When Congress intends to require that two distinct requirements be met, it uses the plural "elements," U.S. Br. 14 n.4 (citing statutes), and it did not use that formulation here.[3]

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[3] Respondent observes (Br. 25-27) that courts considering the same statutory offense definition may divide the offense into different elements in describing the offense to a jury. That is true, but irrelevant. The question here is not the number of elements of the federal offense, but whether one of them — the domestic-relationship requirement—also must have been established beyond a reasonable doubt to

Respondent invokes (Br. 25) the Dictionary Act, but the Act's statement that singular nouns may be treated as plural applies only where doing so would make sense in context, see 1 U.S.C. 1, and would be "necessary to carry out the evident intent of the statute," *First Nat'l Bank* v. *Missouri*, 263 U.S. 640, 657 (1924). Neither is true here: Congress placed the distinct mode of aggression and domestic relationship concepts in two clauses, separated by a comma, and reading the statute to require that both be treated as elements would severely constrict the statute's application. See pp. 2-4, *infra*. The Dictionary Act cannot be used to create an ambiguity where none exists.

2. Respondent argues (Br. 19-24) that the domestic-relationship clause, which begins with the word "committed," modifies the mode of aggression clause, rather than the noun "offense." The words Congress chose and the manner in which it arranged them compel the contrary conclusion.

In ordinary usage, a person "commits" an "offense"; he does not "commit" a "use of physical force" or a "use of a deadly weapon." That conclusion is confirmed by numerous dictionary definitions, which define "commit" as "do," "perform," or "perpetrate," and illustrate the concept by providing the specific example of committing a crime. U.S. Br. 15 (citing definitions). Respondent ignores those numerous probative indicators of common meaning, instead citing (Br. 23) four examples in sup-

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the court that adjudicated the predicate offense. Respondent also asserts (Br. 27) that because "[a] conviction under § 922(g)(9) cannot be secured without proving a domestic relationship in the underlying assault," "such a relationship is an 'element' of the predicate offense," but that analysis mistakenly conflates the elements of the federal offense with the elements of the state offense.

port of his position, only two of which speak of "committing" a "use of force." The linguistics professors amici (Professors Br. 7-8, 3a-9a) add a few more. But none of those examples require the reader to choose between using "committed" to modify (a) an "offense" or (b) a "use of physical force" or "use of a deadly weapon." Although a reader confronted with a sentence in which "use of force" is the *only* object may well read "committed" to modify that object, the presence here of the additional object "offense" makes it extremely unlikely that a reader would choose the awkward construction "committed a use of force."

Moreover, the fact that respondent and the amici have only uncovered a smattering of examples of "committing" a "use of force" belies respondent's assertion that his reading of the statutory language is common. In common usage, "[t]he *use* of force is not 'committed,' 'done' or 'perpetrated.'" *Barnes*, 295 F.3d at 1360. Even the linguistics professors amici, who strain to justify respondent's reading of the statute, agree that it sounds "weird." Professors Br. 4; *id.* at 10 (construction "sounds a little strange"); *id.* at 35 (construction is "relative[ly] rar[e]"). "Committing" an "*offense*," on the other hand, is an extremely common construction, used over a dozen times in this Court's opinions from the past

Term alone[4] and throughout the federal criminal code.[5] Because respondent's reading of the statute "violates the ordinary meaning of [a] key word," *Dunn* v. *CFTC*, 519 U.S. 465, 470 (1997) (internal quotation marks omitted), this Court should reject it.

The structure of the statute confirms that the clause beginning with "committed" modifies the word "offense," rather than modifying the "use or attempted use of physical force, or threatened use of a deadly weapon." The comma preceding the domestic-relationship clause separates it from the mode of aggression clause, and the word "committed" signals that what follows does not continue defining the mode of aggression.[6]

Contrary to respondent's assertion (Br. 19-22), the principle that a qualifying phrase generally should be read to modify the phrase immediately preceding it does

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[4] See, *e.g.*, *Kennedy* v. *Louisiana*, No. 07-343, 2008 WL 4414670, at *1 (Oct. 1, 2008); *Rothgery* v. *Gillespie County*, 128 S. Ct. 2578, 2582 (2008); *Dada* v. *Mukasey*, 128 S. Ct. 2307, 2318 (2008); *Munaf* v. *Geren*, 128 S. Ct. 2207, 2216, 2220-2223, 2225 (2008); *Boumediene* v. *Bush*, 128 S. Ct. 2229, 2259 (2008); *United States* v. *Ressam*, 128 S. Ct. 1858, 1861 (2008); *United States* v. *Rodriquez*, 128 S. Ct. 1783, 1787-1790, 1793 (2008); *Begay* v. *United States*, 128 S. Ct. 1581, 1584 (2008).

[5] For example, the provisions describing principal and accomplice liability use that formulation, see 18 U.S.C. 2(a), 3, as does the penalty provision applicable to firearm offenses like the offense at issue here, see 18 U.S.C. 924(b), (c)(3)(B), (e)(1) and (*o*), and the "crime of violence" provisions upon which respondent relies (Br. 24-25; see p. 4, *supra*), see 18 U.S.C. 16(b), 521(b), (c)(3) and (d), 3156(a)(4)(B), 3559(c)(1)(B), (c)(2)(F)(i)-(ii) and (d)(2).

[6] A simple example illustrates the point. If a statute said: "[L]arceny means an offense that has, as an element, monetary gain, committed by a person," it would be "obvious that 'committed' modifies 'offense' and that monetary gain is the only 'element,'" because "[j]ust as 'monetary gain' is not 'committed,' the 'use of force' is not 'committed.'" *Barnes*, 295 F.3d at 1360.

not compel a contrary conclusion. The comma before "committed" is strong evidence that the qualifying phrase does not apply to the language immediately preceding it. See 2A Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 47:33, at 490-491 (7th ed. 2007); 73 Am. Jur. 2d *Statutes* § 139, at 347 (2001). Moreover, application of the rule of the last antecedent would be inconsistent with the ordinary meaning of the word "commit." See pp. 5-7, *supra*. Notably, in each of the cases respondent cites (Br. 19-20) in which this Court has utilized the rule of the last antecedent, the qualifying phrase was not preceded by any punctuation, and the qualifying phrase began with a relative pronoun ("which" or "whose") that clearly connected the qualifying phrase with the language preceding it. See *Jama* v. *ICE*, 543 U.S. 335, 340-344 (2005); *Barnhart* v. *Thomas*, 540 U.S. 20, 26-27 (2003).[7] Finally, everyone agrees that the rule of the last antecedent cannot be applied strictly in this case, because under a strict application of the rule the "committed" clause would modify only the "threatened use of a deadly weapon," and not the "use or attempted use of physical force." Pet. App. 12a-13a; see Professors Br. 37 (cautioning that the rule cannot "be applied too woodenly").

Respondent's fallback argument (Br. 23 n.5) is that "committed by" is "a harmless verbal excess" that should be ignored. That suggestion runs directly con-

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[7] Respondent is mistaken in contending (Br. 20-22) that the mere number of words between the qualifying phrase and the word "offense" means that the former cannot modify the latter. It is perfectly acceptable, as a matter of grammar, to separate a noun and a qualifying phrase with a relative clause, and the number of words between the qualifying phrase and its object does not change the relationship between the two. See U.S. Br. 21-22.

trary to this Court's presumption against superfluous language. See, *e.g.*, *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001). And it is especially inapt here, because the word "committed" serves important functions: it signifies the introduction of a new thought, along with the comma that precedes it, and it directs the reader back to the word "offense," because, in ordinary usage, a person "commits" an "offense."

3. Respondent's remaining arguments regarding punctuation and spacing provide no basis for requiring that the predicate offense contain a domestic-relationship element. Respondent notes (Br. 16) that, in 18 U.S.C. 921(a)(33)(A), Congress placed a semicolon at the end of clause (i), but placed only a comma, rather than a semicolon or hard return, at the end of the mode of aggression requirement in clause (ii). That is true, but hardly dispositive. A comma, like a semicolon, signifies a break. Compare *The Chicago Manual of Style* ¶ 6.18, at 244 (comma), with *id.* ¶ 6.57, at 256 (semicolon). The fact that Congress could have used a different punctuation mark to make its point (Resp. Br. 16) does not mean this Court should ignore the punctuation mark it chose. And, in any event, imperfect punctuation does not warrant overriding the ordinary meaning of the statutory text. See U.S. Br. 17-18 (collecting cases).[8] Here, re-

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[8] Respondent cites (Br. 17) Military Rule of Evidence 611(d) and Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) regulations, but neither support his argument. Rule 611(d) does not interpret the statute at issue here. The ATF regulations highlight the fact that the statutory language has long been understood to apply to offenses that do not have a domestic-relationship requirement. See U.S. Br. 33-34 (citing 27 C.F.R. 478.11, 478.32(a)(9)). The ATF regulations perhaps show ways Congress could have made its manifest intent even more clear, but they do not make the current statutory text ambiguous.

gardless of the particular punctuation mark or spacing used, the words Congress chose ("commit[]" an "offense") make clear that the domestic-relationship clause modifies the word "offense," not the "use of physical force" or "use of a deadly weapon." See pp. 5-7, *supra*. Respondent's alternative reading of the statute is not consistent with the ordinary meaning of the text or its structure.

B. Requiring That A Predicate Crime Have A Domestic-Relationship Element Frustrates The Statute's Purpose

1. Respondent agrees (Br. 50) that the statute's "original purpose" was to close the loophole that permitted persons convicted of violent misdemeanor offenses against family members and loved ones to possess firearms. But he contends (Br. 49-50) that, during the drafting process, Congress narrowed the statute's focus to encompass only persons who committed violent offenses with a domestic-relationship element, intentionally rendering the statute a dead letter in more than half the States and with respect to the federal government. There is no support for that proposition in the legislative record. Contrary to respondent's suggestion (*ibid.*), the fact that Congress refined the language identifying the type of violent offense necessary provides no indication that Congress also intended to change whether the offense must have a domestic-relationship element. If Congress had suddenly decided to abandon its goal of uniformly prohibiting domestic abusers from possessing firearms, one would have expected it to say so.

All of the evidence of legislative purpose in the record makes clear that Congress's goal was "to keep firearms out of the hands of people whose past violence in domestic relationships makes them untrustworthy cus-

todians of deadly force," regardless of whether their past offense had a domestic-relationship element. *Belless*, 338 F.3d at 1067; see, *e.g.*, 142 Cong. Rec. 22,986 (1996) (statement of Sen. Lautenberg) (statute designed to "keep guns away from violent individuals who threaten their own families"); *id.* at 22,988 (statement of Sen. Feinstein) ("Anyone convicted of a domestic violence offense would be prohibited from possessing a firearm."); *id.* at 27,264 (statement of Sen. Dodd) (statute "prevent[s] anyone convicted of any kind of domestic violence from owning a gun"). The statutory language itself reflects that broad purpose, prohibiting "any" person who has been convicted in "any" court from possessing "any" firearm. 18 U.S.C. 922(g)(9); see also *Barrett* v. *United States*, 423 U.S. 212, 218 (1976) (the "very structure" of Section 922(g) "demonstrates that Congress * * * sought broadly to keep firearms away from the persons Congress classified as potentially irresponsible and dangerous").

In light of that broad purpose, it would make no sense for Congress to limit the statute's application to persons who were previously *convicted* of offenses with a domestic-relationship element. A person who batters a spouse is not less dangerous if he was convicted under a general battery statute as opposed to a specific domestic battery statute. See National Network to End Domestic Violence et al. Br. 3-8 (detailing how possession of firearms by persons who have committed violent domestic offenses substantially increases risks to potential victims and imposes enormous societal costs); Brady Center et al. Br. 8-23 (describing risks to potential victims and to law enforcement officials). To the contrary: Congress determined that "*anyone* who attempts or threatens violence against a loved one has demonstrated

that he or she poses an unacceptable risk, and should be prohibited from possessing firearms." 142 Cong. Rec. at 26,675 (statement of Sen. Lautenberg) (emphasis added); see Senators Lautenberg et al. Br. 9 (Congress's intent was "to prohibit gun possession by *anyone* convicted of a misdemeanor that involved domestic violence"). Yet, under respondent's reading of the statute, only some violent domestic offenders would be prohibited from possessing firearms, creating a patchwork application of federal law. See U.S. Br. 24-27. Indeed, the statute would not even apply to predicate offenses in the home state of the statute's sponsor, Senator Lautenberg. See National Network to End Domestic Violence et al. Br. 17; see also U.S. Br. 23-24 nn.8-9.

Respondent does not dispute that his reading of the statute would render it inapplicable to almost half the States. See U.S. Br. 22-24. Nor does he dispute that there are no uniquely federal offenses to which it would apply. See *id.* at 25. Instead, he merely argues (Br. 46-47) that his interpretation "negates no part of the statute" because the phrase "misdemeanor under Federal . . . law" refers to domestic assaults and batteries that occur in federal enclaves. That is mistaken. The Assimilative Crimes Act permits the assimilation of state law only where no federal criminal statute bars the conduct at issue. See 18 U.S.C. 13(a); see also *Lewis* v. *United States*, 523 U.S. 155, 159-165 (1998). Because federal law criminalizes assault and battery in federal enclaves, see 18 U.S.C. 113(a)(4)-(5), it is extremely unlikely that a domestic assault or battery committed in a federal enclave would be charged as an assimilated state offense. See, *e.g.*, *United States* v. *Chavez*, 204 F.3d 1305, 1308-1309 (11th Cir. 2000) (husband who beat his wife on military base charged under 18 U.S.C. 113(a)(4)).

Thus, not only does respondent's reading severely constrict the statute's scope, but it likely renders the phrase "misdemeanor under Federal * * * law" superfluous.

2. Respondent (Br. 45-46) and his amici (Eagle Forum 23-24; Second Amend. Found. Br. 3, 16) assert that Congress intentionally confined the statute's reach to offenses with a domestic-relationship element "to give States an incentive to enact" such laws. That is incorrect. Section 922(g)(9) is not a remedial grant program—it is a criminal prohibition enacted to punish persons who possess firearms after being convicted of violent offenses against intimate partners.

When Congress wishes to encourage a State "to adopt a legislative program consistent with federal interests," it typically does so using its spending power. *New York* v. *United States*, 505 U.S. 144, 166-167 (1992); see *South Dakota* v. *Dole*, 483 U.S. 203, 208-209 (1987). For example, in the Violence Against Women Act of 1994, Congress authorized a wide variety of grant programs designed "to encourage States, Indian tribal governments and units of local government to treat domestic violence as a serious violation of criminal law." Pub. L. No. 103-322, Tit. IV, § 40231, 108 Stat. 1932. As a result, numerous federal grant programs now provide States with direct financial incentives to enact and enforce domestic violence laws. See 42 U.S.C. 3796gg *et seq.* (grants to combat violent crimes against women); 42 U.S.C. 3796hh *et seq.* (grants to ensure enforcement of protection orders against domestic abusers).

The fact that those measures were in place when Congress enacted Section 922(g)(9) makes it extremely unlikely that Congress intended to prompt additional state action simply by criminalizing the later act of gun possession in Section 922(g)(9). Moreover, it would

make no sense for Congress to *exempt* persons who concededly committed violent acts against family members from the possession ban in order to *further* its goal of combating domestic violence. The more likely scenario, which is borne out by the legislative record in this case, is that Congress intended to, and did, prohibit *all* domestic offenders from owning firearms.

3. Respondent (Br. 47-48) and his amicus (Gun Owners Found. Br. 19-25) suggest that Congress intentionally limited the statute to predicate offenses with a domestic-relationship element to speed the background check process under the Brady Handgun Violence Prevention Act (Brady Act), Pub. L. No. 103-159, 107 Stat. 1536 (1993) (primarily codified at 18 U.S.C. 922(s)-(t)). The Brady Act requires federally licensed firearms importers, manufacturers, and dealers to verify that individuals who wish to purchase firearms are not prohibited from doing so under state or federal law. 18 U.S.C. 922(t)(2); 28 C.F.R. 25.1. That verification is performed using the National Instant Criminal Background Check System (NICS), a computer system maintained by the Federal Bureau of Investigation. 28 C.F.R. 25.3, 25.4.

There is no evidence in the legislative record that Congress intentionally limited the reach of Section 922(g)(9) because it was concerned that law enforcement officials would not be able to identify which crimes are "misdemeanor crime[s] of domestic violence." When Congress desires to improve the efficiency of the NICS, it does so directly; it does not sacrifice other legislative goals in the hopes of obtaining minor system improvements. See NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180, 121 Stat. 2559 (to be codified at 18 U.S.C. 922 note (Supp. II 2008)). Moreover, Congress knew at the time it enacted the statute that "it will

not always be possible * * * to determine from the face of someone's criminal record whether a particular misdemeanor conviction involves domestic violence." 142 Cong. Rec. at 26,675 (statement of Sen. Lautenberg). In those instances, Congress expected that law enforcement officials would undertake "further exploration" to determine whether the offense qualifies. *Id.* at 26,676. Congress did not, as respondent contends, give up and exempt dangerous domestic offenders in two-thirds of the States simply because additional efforts might be required to identify them.

Further, there is no evidence that respondent's interpretation of the statute would "streamline[]" (Resp. Br. 47) background checks under the Brady Act. When an individual wishes to purchase a firearm from a licensed dealer, he completes a form that asks a number of questions relating to the prohibitions contained in 18 U.S.C. 922(g), including, "Have you ever been convicted in any court of a misdemeanor crime of domestic violence?" ATF, Form 4473, at 1 (rev. Aug. 2008) <http://www.atf.gov/press/2008press/100308atf-important-ffl-notice.htm>; see ATF, *Federal Firearms Regulations Reference Guide* 192 (2005) (*Firearms Guide*) <http://www.atf.gov/pub/fire-explo_pub/2005/p53004/index.htm>.[9] If the buyer answers "yes" to any of those questions, the sale cannot proceed. Form 4473, at 2; see 18 U.S.C. 922(d). If not, then the dealer contacts the FBI or a state criminal justice agency operating as an NICS point of contact to initiate an NICS background check. If, for example, the FBI is contacted, the dealer

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[9] The individual is not left to guess about the meaning of "misdemeanor crime of domestic violence," because the form specifically explains that offenses such as "*assault and battery*" may qualify. See Form 4473, at 4; see also Gun Owners Found. Br. 22-24.

provides the buyer's biographical information from the form, an NICS check is initiated, and the dealer receives one of two responses: "proceed" (in which case the sale may proceed) or "delayed" (in which case further investigation is necessary). *Firearms Guide* 192; see 27 C.F.R. 478.102. If the transaction is "delayed," law enforcement officials have three business days to investigate whether the prospective buyer is prohibited from possessing the firearm. *Firearms Guide* 192-193; see 18 U.S.C. 922(t)(1)(B)(ii). That investigation typically involves contacting officials in the prosecuting jurisdiction, who provide the needed information using court documents or police reports. FBI, *National Instant Criminal Background Check System, Operations 2005*, at 3 <http://www.fbi.gov/hq/cjisd/nics/ops_report2005/ops_report2005.pdf>. That is just how Congress intended the system to work, and it has worked: from 1998 to 2005, more than 60,000 domestic violence misdemeanants have been precluded from purchasing firearms through NICS background checks. *Id.* at 9, 11.

That background check process will be the same regardless of whether an offense must have a domestic-relationship element to qualify as a "misdemeanor crime of domestic violence." If a dealer contacts the NICS and the prospective buyer has a criminal history, the purchase likely will be delayed—but that delay may last no more than three business days.[10] There is therefore no warrant for assuming that respondent's view of the stat-

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[10] Even if respondent's view of the statute prevailed, it would not eliminate the need for that investigation, because state domestic violence statutes often do not use the same list of covered domestic relationships as Section 921(a)(33)(A). See, *e.g.*, Okla. Stat. Ann. tit. 21, § 644(C) (West Supp. 2008) (extends to a parent or foster parent of the offender and a person "in a dating relationship" with the offender).

ute would significantly speed the process for purchasing firearms. And there is no reason to believe that Congress intended to exempt a majority of misdemeanor domestic offenders from Section 922(g)(9)'s prohibition on gun possession simply to obtain a modest improvement in the efficiency of the background check system.

C. The Statute's History Confirms That Congress Did Not Intend To Limit "Misdemeanor Crimes Of Domestic Violence" To Crimes With A Domestic-Relationship Element

1. Respondent contends (Br. 28-32) that, as a result of a legislative compromise, the definition of "misdemeanor crime of domestic violence" was narrowed to limit it to predicate offenses with a domestic-relationship requirement. The drafting history of that provision belies that contention. As the government has explained (Br. 28-31), Congress considered two different versions of the definition of "misdemeanor crime of domestic violence"—the one introduced by Senator Lautenberg and the one that was eventually enacted. The key difference between those provisions was the substitution of the phrase "an offense that * * * has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon" for the phrase "crime of violence." Compare S. 1632, 104th Cong., 2d Sess. 1 (1996), with 18 U.S.C. 921(a)(33)(A); see U.S. Br. 28-30; Senators Lautenberg et al. Br. 12-18. The domestic-relationship component of the definition did not change in any significant respect from the initial version of the legislation to the final version. See U.S. Br. 29-31 & n.13. The fact that Congress modified the language about the types of violent offenses subject to the possession ban, while leaving unchanged the domestic-relation-

ship language, makes clear that the only legislative compromise concerned the type of violent offenses that would be covered by the statute.

The legislative history confirms the point. Senator Lautenberg specifically explained that the change in the statutory language was intended to clarify which violent offenses qualify as predicate offenses under the statute. See 142 Cong. Rec. at 26,675 (change in definition was regarding "the term crime of violence"); see also U.S. Br. 27-31. Neither Senator Lautenberg nor any other Member of Congress ever suggested that the change was designed to limit the statute to predicate offenses with a domestic-relationship element. See Senators Lautenberg et al. Br. 12. Respondent cites (Br. 30) some Members' concerns about the statute's "breadth," but those concerns were that the statute might be applied to acts that were not sufficiently violent to justify prohibiting firearm possession, not that the statute might be applied to offenses that lacked a domestic-relationship element. See 142 Cong. Rec. at 26,675 (statement of Sen. Lautenberg) ("Some argued that the term crime of violence was too broad, and could be interpreted to include * * * cutting up a credit card with a pair of scissors."). The "final agreement" reached in Congress addressed those concerns by "explicitly" identifying "crimes that have, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon." *Ibid.* It had nothing to do with whether a domestic relationship was an element of the predicate offense.

Respondent suggests (Br. 31) that Congress's deletion of the catch-all clause at the end of the original definition of "misdemeanor crime of domestic violence" supports his view. He hypothesizes (*id.* at 31-32) that there

was uncertainty regarding whether the catch-all clause limited the possession ban to persons convicted of a crime of violence "under the domestic or family violence law of" the convicting jurisdiction, or whether it simply concluded the list of victims covered in the domestic-relationship clause. There is nothing in the legislative record that supports that claim. Moreover, the original language can only reasonably be read one way, because the phrase "under the domestic or family violence law" clearly modified the language immediately preceding it (*i.e.*, "a person similarly situated to a spouse, parent, or guardian of the victim"); no comma or other language suggested that the language related back to "crime of violence."

2. Contrary to respondent's contention (Br. 33-37), the specific, contemporaneous statements of Senator Lautenberg, who sponsored the legislation at issue, shed light on the statute and, in any event, rebut respondent's extra-statutory arguments. Even though those statements are "not controlling," *CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980), they may be instructive, especially where (as here) they address the precise issue before the Court. U.S. Br. 32; cf. *S&E Contractors, Inc.* v. *United States*, 406 U.S. 1, 13 n.9 (1972). At a minimum, they are pertinent in addressing respondent's theory of the statute's history. Senator Lautenberg explained that a predicate offense need not have a domestic-relationship element to be a "misdemeanor crime of domestic violence." 142 Cong. Rec. at 26,675 (noting that the statute extends to "convictions for domestic violence-related crimes, such as assault" that "are not explicitly identified as related to domestic violence"); see U.S. Br. 31-32.

Respondent cites nothing in the legislative record that refutes that view. Instead, he claims (Br. 34) that Senator Lautenberg's comments are "irrelevant" because the legislation was modified from its original form. But the modification related only to the requirement that the predicate offenses be violent, and Senator Lautenberg specifically explained the concerns that prompted that modification and how those concerns were resolved. See pp. 17-18, *supra*. That explanation is probative because it is specific and entirely consistent with the statute's text and purposes. *United States* v. *Meade*, 175 F.3d 215, 219 (1st Cir. 1999).

Respondent also attacks (Br. 35-36) Senator Lautenberg's statements about the reach of the "use of physical force" language as unreliable or "mistaken." But regardless of whether Senator Lautenberg was correct to say that the modified language was "broader" than the original "crime of violence" formulation, 142 Cong. Rec. at 26,675, the fact remains that the modification concerned only the violence component of the predicate offense, not the domestic-relationship component. There is, therefore, no basis for casting aside the numerous statements that confirm that a predicate offense need not have a domestic-relationship element to be a "misdemeanor crime of domestic violence."[11]

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[11] Nor is there any basis for ignoring the fact that Section 921(a)(33)(A) consistently has been interpreted to apply to predicate offenses without a domestic-relationship element. See U.S. Br. 32-34. Not only has Congress failed to correct that interpretation, but it has continued to enact new laws that rely on the definition in Section 921(a)(33)(A). See *id.* at 18-19, 33-34 (citing 25 U.S.C. 2803(3)(c) (Supp. V 2005) and NICS Improvement Amendments Act of 2007, § 3, 121 Stat. 2561); see also Brady Center et al. Br. 35-37; Senators Lautenberg et al. Br. 24-27.

D. No Constitutional Concerns Warrant Limiting Section 921(a)(33)(A) To Crimes With A Domestic-Relationship Element Or Remanding The Case

1. Respondent's amicus (Eagle Forum Br. 10-22) contends that this Court should rely on the principle of constitutional avoidance to adopt respondent's reading of the statute. Amicus, however, has not identified any "grave and doubtful" constitutional questions raised by the government's construction. *Jones* v. *United States*, 526 U.S. 227, 239 (1999).

First, amicus's Second Amendment argument lacks merit. Although the Second Amendment guarantees individuals a right to possess a firearm in the home for the lawful purpose of self-defense, *District of Columbia* v. *Heller*, 128 S. Ct. 2783, 2817-2818, 2822 (2008), this Court has also recognized that that right "is not unlimited," *id.* at 2816. Thus, in *Heller*, the Court noted that "nothing in [its] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill," *id.* at 2816-2817, reflecting the historical understanding that a person may forfeit his right to keep and bear arms through the commission of serious criminal conduct or where the possession may pose serious safety risks because of an individual's demonstrated lack of self-control. The Court added that it identified such "presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive." *Id.* at 2817 n.26.

In enacting Section 922(g)(9), Congress permissibly concluded that, in addition to felonies, a narrow range of violent misdemeanor offenses should result in the forfeiture of the right to possess a firearm. That restriction is valid because Section 922(g)(9) targets violent conduct

that, by its nature, casts doubt on the defendant's suitability to possess firearms safely and responsibly. See, *e.g.*, 18 U.S.C. 921(a)(33)(A)(ii) (predicate offenses must have "as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon"). Indeed, even respondent's amicus recognizes that, "[l]ike other valuable civil rights, the right to keep and bear arms may be forfeited by engaging in violent criminal activity." Second Amend. Found. Br. 2; see *id.* at 19 & n.10 ("The right to keep and bear arms would be self-defeating were it retained by violent criminals."). And at the time of the Framing, even the most ardent supporters of a specific amendment guaranteeing an individual right to keep and bear arms recognized that those who engaged in violent criminal activity would not enjoy the benefit of such a right. See 2 Bernard Schwartz, *The Bill of Rights: A Documentary History* 665, 681 (1971). Not surprisingly, therefore, all of the courts that have considered Second Amendment challenges to Section 922(g)(9) since *Heller* have rejected them.[12]

Even if there were serious Second Amendment concerns about Section 922(g)(9), amicus does not explain how limiting its reach to predicate offenses with a domestic-relationship element would alleviate those concerns. Amicus's primary objection (Eagle Forum Br. 13-14) is that Second Amendment rights cannot be forfeited by commission of misdemeanors, and that objection is

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[12] See *United States* v. *Chester*, Crim. No. 2:08-00105, 2008 WL 4534210, at *1-*2 (S.D. W. Va. Oct. 7, 2008); *United States* v. *Skoien*, No. 08-CR-12-BBC, 2008 U.S. Dist. LEXIS 66105, at *1-*4 (W.D. Wis. Aug. 27, 2008); *United States* v. *Booker*, 570 F. Supp. 2d 161, 163-164 (D. Me. 2008); *United States* v. *White*, Crim. No. 07-00361-WS, 2008 WL 3211298, at *1 (S.D. Ala. Aug. 6, 2008).

not lessened if prohibition is limited to misdemeanors with a domestic-relationship element.

Amicus's other constitutional objections (Eagle Forum Br. 14-22) likewise lack merit. Section 922(g)(9) does not violate the Ex Post Facto Clause, because it punishes the act of firearm possession, not the predicate offense that makes that possession illegal. See, *e.g.*, *United States* v. *Mitchell*, 209 F.3d 319, 322-324 (4th Cir.), cert. denied, 531 U.S. 849 (2000). The statute does not violate the Due Process Clause, because domestic violence offenders have sufficient notice that it is illegal for them to possess firearms; "ignorance of the law is no excuse," and, in any event, "an individual's domestic violence conviction should itself put that person on notice that subsequent possession of a gun might well be subject to regulation." *United States* v. *Hutzell*, 217 F.3d 966, 968-969 (8th Cir. 2000), cert. denied. 532 U.S. 944 (2001); see also, *e.g.*, *United States* v. *Smith*, 171 F.3d 617, 622-626 (8th Cir. 1999) (rejecting vagueness challenge).[13] Section 922(g)(9) is a permissible exercise of Congress's Commerce Clause power because Congress "has the power to regulate the interstate trade in firearms" by "act[ing] to stem the flow of guns to those whom it rationally believes may use them irresponsibly," and Section 922(g) contains a jurisdictional element that limits its application to firearm possession "in or affecting commerce." *Gillespie* v. *City of Indianapolis*, 185

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[13] Amicus is mistaken in describing (Gun Owners Found. Br. 13-15) the mens rea requirement under Section 922(g). The statute's "knowledge" requirement refers to the fact of possession, not knowledge of the fact that the possession was illegal. See *Bryan* v. *United States*, 524 U.S. 184, 192-193 (1998); see also *United States* v. *Shelton*, 325 F.3d 553, 563 (5th Cir. 2003) (citing cases), cert. denied, 540 U.S. 916 (2003) and 543 U.S. 1057 (2005).

F.3d 693, 700-707 (7th Cir. 1999), cert. denied, 528 U.S. 1116 (2000). Finally, even if any of amicus's constitutional concerns had merit, amici provide no explanation of how respondent's reading of the statute would mollify those concerns.

2. Respondent suggests (Br. 50-52) that if this Court rejects his reading of the statute, it should remand his case to permit him to mount a constitutional challenge to 18 U.S.C. 922(g)(9). But respondent never raised a Second Amendment challenge to his conviction in the district court or court of appeals, despite numerous opportunities to do so. Nor did he raise the issue in his brief in opposition to the petition for certiorari. And he readily acknowledges (Br. 50-51) that a Second Amendment challenge is not fairly included within the question presented. Respondent's constitutional claim therefore has been waived, and he cannot resurrect it at this late date. See, *e.g.*, *United States* v. *Bean*, 537 U.S. 71, 74 n.2 (2002) (finding claim "waived" when "respondent raised it for the first time in his brief on the merits to this Court"); see also Sup. Ct. R. 14.1(a), 15.2. In any event, respondent's constitutional argument lacks merit. See pp. 21-22, *supra*.

E. The Categorical Approach To Classifying Predicate Offenses Does Not Resolve The Question Presented

Respondent has abandoned the argument (Br. in Opp. 15-17) that the categorical approach to interpreting prior convictions for sentence enhancement purposes justifies dismissal of the indictment in this case. See U.S. Br. 34-37. His amicus, however, presses another version of that argument, contending that the categorical approach should be used to resolve the statutory interpretation issue in respondent's favor. See Second

Amend. Found. Br. 13-16. That argument is unavailing. The question here is not how to determine whether a certain predicate offense had all of the required elements (the question addressed through the categorical approach), but which elements are required in the first place. Attempting to answer that question through the categorical approach improperly "puts the cart before the horse." *Meade*, 175 F.3d at 221; see also U.S. Br. 34-37.

F. There Is No Reason To Resort To The Rule Of Lenity

1. Respondent misunderstands the trigger for the rule of lenity. Although he correctly notes that the rule should only be invoked "[a]fter all interpretative means are exhausted" (Br. 41), he contends that legislative purpose may not be considered as part of the interpretative process (*id.* at 43 n.11). That is incorrect. This Court routinely and appropriately considers legislative purpose before turning to the rule of lenity. See, *e.g.*, *Caron* v. *United States*, 524 U.S. 308, 316 (1998) (rejecting application of the rule of lenity where the defendant's reading "is an implausible reading of the congressional purpose"); *Moskal* v. *United States*, 498 U.S. 103, 108, 118 (1990) (rule of lenity applies only after Court has reviewed "the language and structure, legislative history, and motivating policies of the statute" (internal quotation marks omitted)).

Contrary to respondent's suggestion (Br. 43), the rule of lenity is applicable only when there is a "grievous ambiguity" in the statutory text, such that, "after seizing everything from which aid can be derived, . . . [the Court] can make no more than a guess as to what Congress intended." *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998) (internal quotation marks and cita-

tions omitted). A statute does not have a "grievous ambiguity" simply because courts have disagreed as to its meaning, *Reno* v. *Koray*, 515 U.S. 50, 64-65 (1995), or because it is "*possible* to articulate a construction more narrow than that urged by the Government," *Moskal*, 498 U.S. at 108.

2. There is no grievous ambiguity in this case. The statutory text makes plain that an offense need not have a domestic-relationship element to be a "misdemeanor crime of domestic violence"; such a requirement would unnaturally constrict the scope of the statute, rendering it inoperable in almost half the States; and the statutory history confirms that Congress did not intend such a limitation. Respondent and his amici strain to provide a merely plausible reading of the statutory text while essentially ignoring the statute's purposes and history. But a mere "grammatical possibility" is not sufficient to trigger the rule of lenity, *Caron*, 524 U.S. at 316, and the rule does not permit "engraft[ing] an illogical requirement to [the statutory] text," *Salinas* v. *United States*, 522 U.S. 52, 66 (1997). The rule of lenity thus has no application in this case.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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In the United States Supreme Court

UNITED STATES OF AMERICA,
Petitioner,

v.

RANDY EDWARD HAYES,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF BRADY CENTER TO PREVENT GUN VIOLENCE, INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, MAJOR CITIES CHIEFS, NATIONAL SHERIFFS' ASSOCIATION, NATIONAL ORGANIZATION OF BLACK LAW ENFORCEMENT EXECUTIVES, HISPANIC AMERICAN POLICE COMMAND OFFICERS ASSOCIATION, POLICE EXECUTIVE RESEARCH FORUM, NATIONAL BLACK POLICE ASSOCIATION, NATIONAL LATINO PEACE OFFICERS ASSOCIATION, LEGAL COMMUNITY AGAINST VIOLENCE AND SCHOOL SAFETY ADVOCACY COUNCIL SUPPORTING PETITIONERS

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STATEMENTS OF INTEREST[1]

Brady Center to Prevent Gun Violence

The Brady Center to Prevent Gun Violence is a non-profit organization dedicated to reducing gun violence through education, research, and legal advocacy. The Brady Center has a substantial interest in ensuring that federal gun laws are properly interpreted to allow strong government action to prevent gun violence. Through its Legal Action Project, the Brady Center has filed numerous briefs amicus curiae in cases involving the interpretation of federal firearms laws.

International Association of Chiefs of Police

The International Association of Chiefs of Police is the largest organization of police executives and line officers in the world, representing more than 20,000 members in 112 countries.

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[1] Pursuant to Supreme Court Rule 37.3(a), the *amici curiae* state that the parties have consented to the filing of this brief and letters of consent have been filed in the office of the Clerk. Pursuant to Supreme Court Rule 37.6, the *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no party made a monetary contribution intended to fund the preparation or submission of this brief. *Amici curiae* further state that no one other than *amici curiae* and their counsel made a monetary contribution to the preparation or submission of this brief.

Major Cities Chiefs

The Major Cities Chiefs is composed of police executives heading the fifty-six largest police departments in the United States, protecting roughly forty percent of America's population.

National Sheriffs' Association

The National Sheriffs' Association ("NSA"), now in its sixty-seventh year of serving law enforcement and other criminal justice professionals of the nation, is a non-profit organization dedicated to raising the level of professionalism among those in the criminal justice field. Through the years, NSA has provided programs for Sheriffs, their deputies, chiefs of police, and others in the field of criminal justice to perform their jobs in the best possible manner and to better serve the people of their cities, counties or jurisdictions. NSA represents more than 3,000 of the nation's sheriffs.

National Organization of Black Law Enforcement Executives

The National Organization of Black Law Enforcement Executives represents 3,500 members nationwide, primarily police chiefs, command-level officers, and criminal justice educators.

Hispanic American Police Command Officers Association

The Hispanic American Police Command Officers Association represents 1,500 command law enforcement officers and affiliates from municipal

police departments, county sheriffs' offices, and state and federal agencies.

Police Executive Research Forum

The Police Executive Research Forum is a national membership organization of progressive police executives dedicated to improving policing through research and involvement in public policy debate.

National Black Police Association

The National Black Police Association represents approximately 35,000 individual members and more than 140 chapters.

National Latino Peace Officers Association

The National Latino Peace Officers Association is the largest Latino law enforcement organization in the United States, with a membership including chiefs of police, sheriffs, police officers, parole agents, and federal officers.

Legal Community Against Violence

Legal Community Against Violence ("LCAV") is a public interest law center dedicated to preventing gun violence, formed in the wake of the 1993 assault weapon massacre at 101 California Street in San Francisco. The nation's only organization devoted exclusively to providing legal assistance in support of gun violence prevention, LCAV assists cities and counties in crafting a variety of local regulations to fit community needs.

School Safety Advocacy Council

The School Safety Advocacy Council, a national organization with expertise on school-based policing, trains law enforcement and school officials to address issues of child safety at school and in the community.

SUMMARY OF THE ARGUMENT

The Fourth Circuit ruling, if allowed to stand, could re-arm thousands of convicted domestic violence abusers, placing in jeopardy the family members of these abusers as well as the law enforcement officers summoned to address such violence. In deviating from the uniform statutory interpretation of nine other Circuit Courts, the Fourth Circuit misconstrued the plain meaning and legislative intent of 18 U.S.C. §§ 921(a)(33) and 922(g)(9) ("the Lautenberg Amendment"), heightening the risk of violence by convicted domestic violence abusers armed with firearms.

Congress enacted the Lautenberg Amendment to prevent dangerous domestic violence abusers from having access to firearms. Law enforcement officers respond to more than two million domestic violence assaults annually, and these crimes constitute as much as one-third of all violent crimes in the United States. Women are more than twice as likely to be shot by their male intimates as they are to be shot, stabbed or killed in any other way by a stranger.

Our society asks police officers to walk into these dangerous confrontations knowing that an officer who responds as a peacekeeper often becomes a target of violence. A recent study concluded that 14% of all police officer deaths occurred during a response to domestic violence calls. As summed up by the Chairman and CEO of the National Law Enforcement Officers Memorial Fund:

> No assignment poses more uncertainty and danger to a law enforcement professional than a domestic disturbance call. The circumstances are emotionally charged, and weapons, alcohol and drugs are often involved. An officer who responds as a peacekeeper often becomes a target of the violence.[2]

If the Fourth Circuit ruling is upheld, it will represent the first time since enactment of the Brady Law in 1993 that thousands of dangerous persons will have their names removed from the National Instant Criminal Background Check System (NICS). Such a purging of names of dangerous, convicted abusers will allow them to purchase firearms again, thereby creating a public safety crisis and immediately endangering countless abuse victims and the law enforcement officers who must respond to domestic violence conflicts.

Upholding the Fourth Circuit's ruling will threaten victims of abusers who were convicted or entered guilty pleas over more than a decade. Convicted domestic violence misdemeanants in more than half of the states in the Nation will be permitted to re-arm themselves, as these states do not have laws that include a domestic relationship as an element of the relevant crime. For more than a

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[2] National Law Enforcement Officers Memorial Fund, *Domestic Violence Takes a Heavy Toll on the Nation's Law Enforcement Community, available at* http://www.nleomf.com/media/press/domestic violence07.htm (accessed May 13, 2008).

decade these states have relied on an interpretation of the Lautenberg Amendment that disarmed convicted domestic violence abusers regardless of whether the domestic relationship was an element of the underlying misdemeanor crime. Even in states that have laws that include such a relationship as an element, prosecutors have been free to bring charges or accept pleas that do not include the relationship as an element of the crime, while knowing that such dangerous persons will still be barred from possessing firearms.

At the time of its enactment, only 17 of the 50 states had misdemeanor statutes that would have qualified under 18 U.S.C § 921(a)(33) if the domestic relationship were a required element of the offense. Congress could not have intended such a limited application to so widespread a problem. Indeed, Senator Lautenberg, the legislation's chief sponsor, made clear it did not, identifying the statute's purpose as "clos[ing] this dangerous loophole" in which "over 30 states" treated spousal abusers as misdemeanants still eligible to possess firearms.[3]

The Fourth Circuit's interpretation cannot be reconciled with the language of the Lautenberg Amendment, its legislative history, its consistent interpretation by courts of all other circuits and its application by the Attorney General of the United States. The decision of the Fourth Circuit – which is contrary to the plain language and intent of the statute at issue here and would create a public safety

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[3] 142 Cong. Rec. S10377-01, 10378 (1996).

nightmare for the victims of thousands of domestic violence abusers – should be reversed.

ARGUMENT

I. Domestic Violence Is a Pervasive National Public Safety Problem Made More Deadly When Abusers Have Access to Firearms

Domestic violence is a pervasive public safety problem exacerbated when abusers have access to firearms.[4] Approximately 1.3 million women and 835,000 men are physically assaulted by an intimate partner annually in the United States.[5] Many more domestic violence crimes are never reported.[6]

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[4] The Lautenberg Amendment defines a "misdemeanor crime of domestic violence" as an offense that "(i) is a misdemeanor under Federal, State, or Tribal law; and (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim." 18 U.S.C. § 921(a)(33).

[5] Patricia Tjaden & Nancy Thoennes, Nat'l Inst. of Justice & Ctrs. for Disease Control and Prevention, *Full Report of the Prevalence, Incidence, and Consequences of Violence Against Women*, NCJ 183781, at iv (Nov. 2000), *available at* http://www.ncjrs.gov/pdffiles1/nij/183781.pdf. About 22% of women and 7% of men report having been physically assaulted by an intimate partner. *Id.*

[6] *See, e.g., Reporting Crime to the Police 1992-2000*, Bureau of Justice Statistics Special Report, U.S. Dep't of Justice, at 5,

About one-quarter of all nonfatal violent crimes are committed by intimate partners.[7] One study found that family violence accounted for 33% of violent crimes, with 53% of those crimes between spouses.[8] Almost 50% of intimate partner assaults resulted in arrests.[9]

More chilling is the fact that, on average, 3.5 people are killed by intimate partners every day in

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available at http://www.ojp.usdoj.gov/bjs/pub/press/fvspr.pdf (54% of violent and seriously violent crimes committed by intimate partners reported to police).

[7] Callie Marie Rennison, Bureau of Justice Stat., U.S. Dep't of Justice, *Intimate Partner Violence, 1993-2001*, NCJ 197838 (Feb. 2003) (in 2001, 23% of non-fatal violent crimes committed by intimate partners).

[8] Matthew R. Durose et al., Bureau of Justice Stat., U.S. Dep't of Justice, *Family Violence Statistics*, NCJ 207846 at 2. Between 2001 and 2005, about 22% of violent crimes against women were committed by intimate partners. Shannon Catalano, Bureau of Justice Stat., U.S. Dep't of Justice, *Intimate Partner Violence in the U.S.*, at 1, *available at* http://www.ojp.usdoj.gov/bjs/intimate/victims.htm (analyzing crimes reported by police in 18 states and the District of Columbia). According to another recent report, 39.7% of reported assault and intimidation cases in 2000 were between intimate partners. *Id. at 52.* David Hirschel, et al., *Explaining the Prevalence, Context, and Consequences of Dual Arrest in Intimate Partner Cases, Final Report to the DOJ*, at xiii (Apr. 2007), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/218355.pdf. [hereinafter *Explaining the Prevalence*].

[9] *Explaining the Prevalence, supra* note 8, at 60.

the United States.[10] Intimate partner homicides account for between one-third to one-half of all female homicides.[11] Every year in the United States, between 1000 and 1600 women die at the hands of their male partners, often after a long escalating pattern of battering.[12]

Policies that prohibit batterers from possessing firearms reduce the fatal and non-fatal use of guns by batterers. Studies indicate that prohibiting violent misdemeanants from possessing firearms is associated with a specific decrease in the risk of arrest for new firearm crimes and violent crimes.[13]

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[10] Elizabeth Richardson Vigdor & James A. Mercy, *Do Laws Restricting Access to Firearms by Domestic Violence Offenders Prevent Intimate Partner Homicide?*, 30 Evaluation Rev. 313 (2006).

[11] Catalano, *supra* note 8, at 1 (30%); Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 Am. J. of Pub. Health 1089 (2003) (40%-50%) [hereinafter *Risk Factors for Femicide*]. According to the FBI, 1,117 of the total 3,156 women murdered in 2006 (35%) were murdered by a current or ex spouse/common law spouse or a boyfriend. Federal Bureau of Investigation's 2006 Crime in the United States, *Supplemental Homicide Report*, *available at* http://www.fbi.gov/ucr/cius2006/offenses/violent_crime/murder_homicide.html (Tables 1 and 9).

[12] U.S. Dep't of Justice, National Institute of Justice, No. 250, *Intimate Partner Homicide*, at 27, *available at* http://www.ncjrs.gov/pdffiles1/jr000250.pdf.

[13] Garen J. Wintemute, et al., Violent Prevention Research Program, *Effectiveness of Denial of Handgun Purchase by Violent Misdemeanants*, Journal of the American Medical

Risk of arrest was directly related to the number of prior convictions subjects had acquired.[14] Denial of a handgun purchase has its greatest effect in reducing the risk of a first arrest for a gun crime.[15]

On the other hand, allowing domestic violence abusers access to firearms is strongly associated with intimate partner female homicide.[16] A gun-owning abuser has a much greater likelihood of using a gun in the worst incident of abuse – female homicide.[17] The presence of a gun in a violent home substantially elevates the risk that domestic violence will turn deadly.[18] When domestic violence incidents involve a firearm, the abuse is twelve times more likely to result in death compared to abuse incidents that do not involve a firearm.[19] The mere presence of a gun in the home of an abuser makes an abused woman at

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Association, at 2 (May 29, 2002), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/197063.pdf.

[14] *Id.* at 41.

[15] *Id.* at 42.

[16] *Risk Factors for Femicide*, *supra* note 11, at 1090 & 1092.

[17] *Id.* at 1092.

[18] Shannon Frattaroli & Jon S. Vernick, *Separating Batterers and Guns*, 30 Evaluation Rev. 296 (2006); Emily F .Rothman et al, *Gun Possession Among Massachusetts Batterer Intervention Program Enrollees*, Evaluation Review Vol. 30 No. 3, 283 (June 2006)

[19] *Id.*

least six times more likely than other abused women to be killed.[20]

Women are more than twice as likely to be shot by their male intimates as they are to be shot, stabbed, or killed in any other way by a stranger.[21] While the number of homicides of women by strangers has decreased, the number of homicides by intimates with handguns has increased.[22] In each year from 1980 to 2000, 60 – 70% of batterers who killed their female intimate partners used firearms to do so.[23] Moreover, an abuser's previous threats with a weapon or threats to kill are associated with substantially higher risks for female homicide.[24] It has been found that women who were threatened

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[20] National Institute of Justice, *Intimate Partner Homicide*, *supra* note 12 at 16. Another analysis showed that prior domestic violence in the household made a woman 14.6 times more likely, and having one or more guns in the home made a woman 7.2 times more likely, to be the victim of domestic violence homicide. James E. Bailey, MD, MPH, et al., *Risk Factors for Violent Death of Women in the Home*, Archives of Internal Medicine 157, No. 7 (1997): 777-782.

[21] Susan B. Sorenson, *Firearm Use in Intimate Partner Violence*, 30 Evaluation Rev. 229, 232 (2006).

[22] *Id.* at 233.

[23] Emily F. Rothman, *Batterers' Use of Guns to Threaten Intimate Partners*, 60 J. Am. Med. Women's Ass'n 62, 62 (2005).

[24] *Risk Factors for Femicide*, *supra* note 11, at 1092.

with a gun or assaulted with a gun are twenty times more likely to be subsequently murdered.[25]

In addition to death, domestic violence abusers armed with guns cause other harm to their victims. Sixteen of every 1,000 U.S. women have been threatened with a gun, and seven in 1,000 women have had a gun used against them by an intimate partner.[26] Firearms are used by many domestic violence offenders to intimidate the victim.[27] Guns are used to coerce behaviors, such as sexual relations, or as a means to inflict terror.[28]

Previous criminal involvement or homicidal behavior has also been shown to be associated with the use of guns by batterers who kill or threaten to kill intimate partners.[29] In one study of all batterers

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[25] *Id.*; National Institute of Justice, *Intimate Partner Homicide*, *supra* note 12, at 16.

[26] Sorenson, *supra* note 21, at 235.

[27] Int'l Ass'n of Chiefs of Police, *Taking a Stand: Reducing Gun Violence In Our Communities*, at 16 (2007), *available at* http://www.theiacp.org./documents/pdfs/publications/acf1875.pdf. Obvious threats include pointing the gun at the victim, however, other threats are intended (and perceived) based on the act of cleaning a gun, or shooting a gun outside either at a target or randomly.

[28] Sorenson, *supra* note 20, at 235.

[29] Rothman, *supra* note 23 at 62. *See also* Jacqueline C. Campbell et al., *Assessing Risk Factors for Intimate Partner Homicide*, NIJ Issue No. 250, 17 (2003), *available at* http://www.ncjrs.gov/pdffiles1/jr000250e.pdf (women whose

enrolled in Massachusetts' batterer programs from 2002 – 2005, the batterers who reported gun possession were a "dangerous subgroup" who reported, among other things, attempting homicide and using a firearm to threaten an intimate partner.[30]

Domestic violence abusers also impose substantial costs on society. The costs of domestic violence exceed $5.8 billion each year, with nearly $4.1 billion in direct medical and mental health related costs, and nearly $1.8 billion in indirect costs from lost productivity and lost lifetime earnings.[31] It

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partners were violent outside the home were twice as likely than other women to be murdered by their partner); Lawrence A. Greenfeld et al., *Violence by Inmates*, Bureau of Justice Statistics Factbook, U.S. Dep't of Justice, at vi, 23 & 26 (March 1998), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/vi.pdf (among those in local jail convicted of intimate violence, 78% had a prior conviction history, and most of these had a history of convictions for violence; 2 out of 3 State prisoners serving time for intimate violence had a prior conviction history; nearly 40% of convicted violent offenders in local jails who committed crimes against intimates had a criminal justice status at the time of the offense; chronic violence offenders accounted for 3 in 10 of State prisoners serving time for violence against an intimate partner, and nearly 6 in 10 local jail inmates convicted of intimate violence).

[30] Rothman, *supra* note 18, at 283, 291.

[31] Nat'l Ctr. For Injury Prevention and Control, Ctrs. For Disease Control and Prevention, *Costs of Intimate Partner Violence Against Women in the United States*, at 2 (2003), *available at* http://www.cdc.gov/ncipc/pub-res/ipv_cost/IPVBook-Final-Feb18.pdf.

has been estimated that the lifetime medical costs in one year alone for all U.S. gunshot injuries was $2.3 billion, of which $1.1 billion was paid by U.S. taxpayers.[32]

II. Allowing Convicted Domestic Violence Abusers to Arm Themselves With Firearms Will Endanger Law Enforcement Officers

Allowing convicted domestic violence abusers to arm themselves with firearms not only jeopardizes abusers' family members, but also places law enforcement officers at a heightened risk of death or injury. Over one-third of law enforcement deaths that occur in the line of duty are the result of gunfire.[33] On average, 55 officers are killed annually by firearms.[34]

A substantial number of police officer deaths result when officers respond to domestic violence incidents.[35] Eighty-one law enforcement officers were killed when responding to domestic disturbance

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[32] Philip J. Cook et al., *The Medical Costs of Gunshot Injuries in the United States*, 282 J. Am. Med. Ass'n 447, 447 (1999) (costs for injuries in 1994).

[33] Int'l Ass'n of Chiefs of Police, *supra* note 27, at 26.

[34] *Id.* at 28

[35] National Law Enforcement Officers Memorial Fund, *supra* note 2.

calls from 1996 to 2005, or 14% of law enforcement deaths during that period.[36]

According to the Officer Down Memorial Page, Inc., 65 officers were killed by gunfire in 2007, and 11 of those 65 officers were killed while responding to a domestic dispute call.[37]

Behind these bare statistics are police officers who served in the line of duty for many years before facing their death at the hands of domestic abusers:

> On May 3, 2008, Deputy Sheriff William Howell Jr. was killed while responding to a domestic violence disturbance in Orangeburg, South Carolina. Deputy Howell had arrived at a female's home to assist her in removing belongings from the home, when a male suspect opened fire with a rifle and shot Deputy Howell in the neck. Deputy Howell had served in law enforcement for a total of

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[36] *Id.*. The FBI reported that from 1996-2005, 59 officers were feloniously killed where the circumstance at the scene of the incident was a "family quarrel." U.S. Department of Justice Federal Bureau of Investigation *Law Enforcement Officers Killed and Assaulted 2005* (Tables 1 and 20), *available at* http://www.fbi.gov/ucr/killed/2005/feloniouslykilled.htm (accessed May 14, 2008).

[37] 2007 Total Line of Duty Deaths by Gunfire, The Officer Down Memorial Page, Inc., *available at* http://www.odmp.org/search.php?searching=1&yearfrom=2007&yearto=2007&cause=19 (accessed May 22, 2008).

sixteen years, and was survived by a wife and three sons.[38]

Deputy Sheriff Paul Steven Habelt and Deputy Sheriff Tony Ogburn were shot and killed on May 17, 2007 after responding to a domestic violence call in Payne Springs, Texas. When the officers arrived at the scene, the male suspect opened fire on the officers with a high powered rifle. Another officer responding with Deputies Habelt and Ogburn was also wounded at the scene. Deputy Habelt had served in law enforcement for 43 years and was survived by his wife and six children.[39] Deputy Ogburn had served with the Henderson County Sheriff's Department for eight years, and had previously served with the Malakoff Police Department. He was survived by his wife and four children.[40]

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[38] 2008 The Officers Down Memorial Page Remembers . . ., The Officer Down Memorial Page, Inc., *available at* http://www.odmp.org/officer/19358-deputy-sheriff-william-howell-jr (accessed May 22, 2008).

[39] 2007 The Officers Down Memorial Page Remembers . . ., The Officer Down Memorial Page, Inc., *available at* http://www.odmp.org/officer/18885-deputy-sheriff-paul-steven-habelt (accessed May 22, 2008).

[40] 2007 The Officers Down Memorial Page Remembers . . ., The Officer Down Memorial Page, Inc., *available at*

Domestic disturbances are over-represented in assaults and injuries to police officers.[41] According to the FBI, of officers assaulted or injured when responding to a call for police assistance, 30% occurred during domestic violence calls.[42] This was the category with the highest percentage of police officer assaults, with the next highest category, "attempting other arrests," totaling only 16% of officer assaults. In a Charlotte, North Carolina study from 1988 to 1990, domestic disturbance incidents produced 11.8 percent of the assaults to police officers and 9.6 percent of the injuries inflicted on officers.[43] The same study demonstrated that domestic disturbance incidents were also more likely to produce multiple officer victims of assault and injury.[44] In a 1991 study of a Midwestern police department's domestic violence arrest policies, 78.4 percent of the officers indicated that they had been

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http://www.odmp.org/officer/18886-deputy-sheriff-tony-price-ogburn (accessed May 22, 2008).

[41] J. David Hirschel et al., *The Relative Contribution of Domestic Violence to Assault and Injury of Police Officers,* Justice Quarterly, Vol. 11 No. 1 at 107 (March 1994).

[42] Nat'l Law Enforcement Officers Mem'l Fund, *supra* note 34.

[43] J. David Hirschel et al., *supra* note 41.

[44] *Id.* at 109.

physically assaulted in the course of effecting an arrest in a domestic violence call.[45]

Not only do domestic violence incidents pose a risk of injury or death to individual police officers, but police departments spend a disproportionate amount of resources attempting to combat domestic violence. Woman-battering incidents constitute the largest category of calls screened by police officers each year.[46] Nationwide, 15 to 40 percent of all calls for police assistance are family disturbances.[47] According to the Bureau of Justice Statistics in 2000, reporting of abuse incidents increased from 48% in 1993 to 59% in 1998, and there has been an increase in arresting suspected batterers.[48] The Charlotte-Mecklenburg Police Department, for example, responds to approximately 30,000 domestic violence calls annually.[49] Preliminary data from the Charlotte Mecklenburg Police Department indicated

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[45] Paul C. Friday, Scott Metzgar, and David Walters, *Policing Domestic Violence: Perceptions, Experience, and Reality,* Criminal Justice Review 198, 203 (Georgia State University 1991).

[46] Paul C. Friday et al., *Evaluating the Impact of a Specialized Domestic Violence Police Unit,* Research Report: U.S. Department of Justice, at 9 (May 25, 2006).

[47] Breci, Michael G., *Chapter 4: Police Response to Domestic Violence,* Crisis Intervention in Criminal Justice/Social Service 102, 102 (4th Ed. 2006).

[48] Paul C. Friday et al., *supra* note 46 at 9-10.

[49] *Id.*

that in 2003, 56.5% of all calls for assistance were domestic violence calls.[50] In New York County, New York, in 2007, 4,461 arrests were identified as involving domestic violence, and of those, the vast majority were charged as misdemeanors.[51]

The danger of assault or death involved in police work has additional costs for police departments and for police officers: "it results in hazardous duty pay, early retirement programs, use of bulletproof vests, and specialized training in backup assistance and weapon retention."[52] The specter of danger is a major source of stress for police officers and their families.[53]

Police officers are uniquely positioned to see the effects of domestic violence and guns. As one author put it:

> The police are the gatekeepers to the criminal justice system. They are the first responders to problems that occur

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[50] *Id.* at 12.

[51] In 2007, of 4461 arrests flagged by the New York County District Attorney's Office as involving "domestic violence", 3218 were misdemeanor arrests. Interview by Margaret Dale, Partner, Proskauer Rose LLP with Lisa Kellachan, Assistant District Attorney, New York County District Attorney's Office Domestic Violence Unit (May 20, 2008).

[52] Hirschel, *supra* note 41, at 115.

[53] *Id.*

> in the community. How they handle a problem determines how involved other branches of the criminal justice system will become.[54]

Police officers are also uniquely positioned to become a secondary victim of domestic violence. For example, in states with mandatory domestic violence arrest policies or statutes, police officers are required to put themselves in harm's way.[55]

The International Association of Chiefs of Police, in a 2007 Report on "Reducing Gun Violence In Our Communities," recommended that to keep police officers safe, federal and state governments should "reduc[e] the firepower available to criminals" and

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[54] Breci, Michael G., *supra* note at 47.

[55] Twenty-two states and the District of Columbia require mandatory arrests in domestic violence situations. *See* Alaska Stat. § 18.65.530 (2008); Ariz. Rev. Stat. Ann. § 13-3601(B) (2008); Colo. Rev. Stat. Ann. § 18-6-803.6 (West 2008); Conn. Gen. Stat. Ann. § 46b-38b (a) (West 2008); D.C. Code Ann. § 16-1031 (2008); Iowa Code Ann. §§ 236.12 (2) (West 2008), Kan. Stat. Ann. § 22-2307 (b)(1) (2008); La. Rev. Stat. Ann. § 46-2140 (1) (2008); Me. Rev. Stat. Ann. tit 19-A § 4012 (5) (2008); Miss. Code Ann. § 99-3-7 (3) (West 2008); Mo. Ann. Stat. § 455.085.1 (West 2008); Nev. Rev. Stat. Ann. § 171.137 (West 2008); N.J. Stat. Ann. § 2C:25-21 (West 2008); N.Y. Crim. Proc. Law § 140.10 (4)(c) (McKinney's 2008); Ohio Rev. Code Ann. § 2935.032 (A)(1)(a) (West 2008); Or. Rev. Stat. Ann. § 133.055 (2)(a) (West 2008); R.I. Gen. Laws § 12-29-3 (2008); S.C. Code Ann. § 16-25-70 (2007); S.D. Codified Laws Ann. §§ 23A-3-2.1 (2008); Utah Code Ann. § 77-36-2.2 (West 2008); Va. Code Ann. § 19.2-81.3 (West 2008); Wash. Rev. Code Ann. §10.31.100 (2) (West 2008); Wis. Stat. Ann. § 968.075(3)(West 2008).

"[r]equir[e] judges and law enforcement to remove guns from situations of domestic violence . . ."[56] In light of the danger posed by armed abusers, the report also recommended that federal, state, and local laws authorize law enforcement officers to remove all guns and ammunition from the scene of a domestic violence incident and that judges be required to order the removal of guns and ammunition from domestic violence misdemeanants.[57] If the Fourth Circuit ruling is upheld, however, convicted domestic violence abusers will be permitted to re-arm and thus pose a great risk to the public and law enforcement officers.

Prompt intervention in domestic violence situations is necessary to ensure the safety of abuse victims. Intervention with women at risk for abuse decreases intimate partner homicide.[58] Arrest is instrumental in reducing abuse.[59] Further, in up to 80 percent of intimate partner homicides, the man physically abused the woman before the murder.[60]

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[56] Int'l Association of Chiefs of Police, *supra* note 27, at 6.

[57] *Id.* at 17.

[58] *Risk Factors for Femicide, supra* note 11, at 1092.

[59] Friday, Paul C., Metzgar, Scott, and Walters, David, *Policing Domestic Violence: Perceptions, Experience, and Reality,* Criminal Justice Review 198, 200 (Georgia State University 1991).

[60] National Institute of Justice, *Intimate Partner Homicide, supra* note 12, at 18.

Four to five percent of women who have experienced non-lethal intimate partner violence have reported that their partners threatened them with a gun at some point in their lives.[61]

Police officers are only doing their job when they intervene in domestic violence conflicts to protect public safety and prevent injury or death at the hands of domestic abusers. The Fourth Circuit ruling, if upheld, will allow thousands of convicted abusers to arm themselves with guns, placing law enforcement officers who respond to domestic violence calls in jeopardy of personal injury or death.

III. The Fourth Circuit's Interpretation of the Lautenberg Amendment Is Counter to Congressional Intent and Will Put More Guns In the Hands of Domestic Violence Abusers.[62]

A. Congress Did Not Intend To Allow the Possession of Firearms for Domestic Violence Misdemeanants Convicted in States Without a Specific Domestic Violence Assault or Battery Statute

Because domestic violence is a pervasive national epidemic, the Lautenberg Amendment was enacted to establish a "zero tolerance when it comes to guns

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[61] Rothman, *supra* note 23.

[62] *Amici* adopt the arguments put forth by the government that the Fourth Circuit improperly interpreted the plain language of the Lautenberg Amendment.

and domestic violence."[63] As stated by Senator Lautenberg, "the amendment would prohibit any person convicted of domestic violence from possessing a firearm."[64] Senator Lautenberg emphasized that the Amendment contains "the simplest words," to ensure "that a spouse abuser, wife beater, or child abuser should not have a gun."[65]

In enacting this Amendment, Congress could not possibly have intended the distinction that abusers who violate "battery of a spouse" laws should not have guns, while people who batter their spouses but are only charged with simple battery may have guns. This is particularly true because Congress knew that many states simply do not have "battery of a spouse" type laws. When Congress passed the Lautenberg Amendment, only seventeen of the fifty states and Puerto Rico had a law that would qualify under section 921(a)(33), if the domestic relationship were a required element of the predicate offense.[66]

As of 2006, fewer than half of the states had domestic assault statutes that included a domestic relationship element.[67] A majority of states, like

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[63] 142 Cong. Rec. S11872-01, 11878 (1996).

[64] *Id.*

[65] *Id.*

[66] *U.S. v. Smith*, 964 F. Supp. 286, 293 (N.D. Iowa 1997).

[67] *U.S. v. Heckenliable*, 446 F.3d 1048, 1051 -1052 (10th Cir. 2006) (citing *U.S. v. Barnes*, 295 F.3d 1354, 1364 n. 12 (D.C. Cir. 2002)).

New York, charge domestic violence offenders under their general assault laws.[68]

Senator Lautenberg was clear that the new law defined a misdemeanor crime of domestic violence to include convictions for domestic violence-related crimes that do not have as an element proof of a domestic relationship:

> Mr. President, *convictions for domestic violence-related crimes often are for crimes, such as assault, that are not explicitly identified as related to domestic violence.*[69]

Senator Lautenberg urged local law enforcement authorities administering gun registration provisions "to thoroughly investigate misdemeanor convictions on an applicant's criminal record to ensure that none involves domestic violence, before allowing the sale of a handgun."[70]

Senator Lautenberg's commentary further establishes that the Amendment's purpose was to close a nationwide "loophole" where, at the time, a person engaged in domestic violence could, in "over 30 states" be convicted of a misdemeanor and still be able to maintain firearms. Passage of the

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[68] *See id.*

[69] 142 Cong. Rec. S11872-01, 11878 (1996) (emphasis added).

[70] *Id.*

Amendment was intended to seal this "loophole" nationwide. According to Senator Lautenberg:

> In over 30 States, even today, beating your wife or your child is a misdemeanor. In just the past few years, some judges have demonstrated outrageous callousness and disregard for women's lives . . . Two-thirds of domestic violence murders involve firearms. In 150,000 cases of . . . spousal abuse, a gun is present. That means that perhaps it is put to a woman's head or put to her face in front of a child, or children, and even though the trigger is not pulled, the trauma is enormous. There is no reason for someone who beats their wi[fe] or abuses their children to own a gun. When you combine wife beaters and guns, the end result is more death.
>
> *This amendment would close this dangerous loophole and keep guns away from violent individuals who threaten their own families, people who have shown that they cannot control themselves and are prone to fits of violent rage directed, unbelievably enough, against their own loved ones . . .* There is no margin of error when it comes to domestic abuse and guns. A firearm in the hands of an abuser all too often means death. By their nature, acts of domestic violence are especially

> dangerous and require special attention.[71]

As Senator Lautenberg explained, the Amendment was intended to establish nationwide consensus in removing firearms from the hands of domestic violence perpetrators.[72] The Fourth Circuit's interpretation re-opens precisely the loophole the Amendment was enacted to close.

Senator Feinstein's comments related to the Lautenberg Amendment likewise illustrate a broad nationwide application of the statute. According to Senator Feinstein, the statute was passed to address

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[71] 142 Cong. Rec. S10377-01, 10378 (1996) (emphasis added).

[72] Multiple federal circuit courts have concurred that Senator Lautenberg's commentary evidences an intent by Congress that contradicts the Fourth's Circuit's reading of the statute. The First Circuit found Senator Lautenberg's commentary to be "particularly helpful" and "clearly demonstrate Congress's threshold understanding that 'misdemeanor crimes of domestic violence' would not be limited to those in which the relationship status was included as a formal element of the statute of conviction. *United States v. Meade*, 175 F.3d 215, 219 (1st Cir. 1999). As the First Circuit noted, "[p]erhaps most important, Senator Lautenberg's comments are perfectly consistent with the statutory language and the general purpose of the legislation, and promote a logically and linguistically coherent exegesis of the provision here at issue." *Id.* Similarly, the Fifth Circuit quoted the language of other Circuits in describing Senator Lautenberg's commentary as "most convincing." *United States v. Shelton*, 325 F.3d 553, 562 (5th Cir. 2003). The Eighth Circuit noted that Senator Lautenberg's comments "bolster our conclusion" that "Congress evinced its intent that the predicate offense need not contain a domestic relationship as an element." *United States v. Smith*, 171 F.3d 617, 620 (8th Cir. 1999).

"an estimated 2 million women [who] are victimized by domestic violence."[73] Senator Feinstein went on to emphasize that the statute was meant to counteract "[o]utdated or ineffective laws [that] often treat domestic violence as a lesser offense." According to Senator Feinstein:

> Sometimes, victims are reluctant to cooperate for fear of more violence. And sometimes victims just don't want to pu[t] themselves through the ordeal of a trial. And finally, plea bargains often result in misdemeanor convictions for what are really felony crimes. As a result, Mr. President, many perpetrators of severe and recurring domestic violence are still permitted to posses[sic] a gun. Mr. President, these people are like ticking time bombs. It is only a matter of time before the violence get[s] out of hand, and the gun results in tragedy.
>
> Something must be done to close this dangerous loophole. This amendment looks to the type of crime, rather than the classification of the conviction. Anyone convicted of a domestic violence offense would be prohibited from possessing a firearm. Fewer abusers will have guns, and fewer of the abused will wake up each morning wondering

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[73] 142 Cong. Rec. S10379-01, 10380 (1996)

> whether they will live through the day.[74]

Senator Feinstein thus emphasized Congressional intent to close a "dangerous loophole" in state statutes and to look to the "type of crime" and not the "classification of the conviction" in order to provide fewer guns to abusers.[75] Combined with Senator Lautenberg's comments, Senator Feinstein's commentary demonstrates that the Fourth Circuit's holding runs contrary to the intent of Congress.

Upon the passage of the Amendment, the Criminal Division of the United States Department of Justice issued an announcement in its Criminal Resource Manual that set out the definition of a "misdemeanor crime of domestic violence" and explained:

> This definition includes all misdemeanors that involve the use or attempted use of physical force (e.g., simple assault, assault and batter), if the offense is committed by one of the defined parties. This is true whether or not the statute specifically defines the offense as a domestic violence misdemeanor.[76]

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[74] *Id.*

[75] *Id.*

[76] Criminal Resource Manual 1117 "Restrictions on the Possession of Firearms by Individuals Convicted of a Misdemeanor Crime of Domestic Violence," *available at*

http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm01117.htm.

See also 27 C.F.R. Part 478.11. The regulations promulgated to implement the Lautenberg Amendment prohibit the sale, shipment, transportation, possession, or receipt of firearms by individuals convicted of a "misdemeanor crime of domestic violence," and make clear that this term was defined so as not to require that battery of a spouse be an element of the offense:

> Misdemeanor crime of domestic violence. (a) Is a Federal, State or local offense that:
>
> (1) Is a misdemeanor under Federal or State law or, in States which do not classify offenses as misdemeanors, is an offense punishable by imprisonment for a term of one year or less, and includes offenses that are punishable only by a fine. (This is true whether or not the State statute specifically defines the offense as a "misdemeanor" or as a "misdemeanor crime of domestic violence." The term includes all such misdemeanor convictions in Indian Courts established pursuant to 25 CFR part 11.);
>
> (2) Has, as an element, the use or attempted use of physical force (e.g., assault and battery), or the threatened use of a deadly weapon; and
>
> (3) Was committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, (e.g., the equivalent of a "common law" marriage even if such relationship is not recognized under the law), or a person similarly situated to a spouse, parent, or guardian of the victim (e.g., two persons who are residing at the same location in

The Criminal Division announced that the bill passed with "almost unanimous support and represents Congress's recognition that 'anyone who attempts or threatens violence against a loved one has demonstrated that he or she poses an unacceptable risk, and should be prohibited from possessing firearms.'"[77]

> an intimate relationship with the intent to make that place their home would be similarly situated to a spouse).

See also Report on the Activities of the Committee on the Judiciary, H.R. 105-845 (at 88), summarizing the Amendment:

> Passed during the 104th Congress, section 658 of the Omnibus Appropriations bill for fiscal year 1997 (H. Rept. 104-863) amended S S 921 and 922 of title 18, United States Code, to prohibit persons previously convicted of a misdemeanor crime of domestic violence from possessing a firearm. . . A 'misdemeanor crime of domestic violence' is defined under the new law as an offense that is (1) either a federal or state charge, and (2) has as an element the use or attempted use of physical force, or the threatened use of a deadly weapon, and (3) is committed by a current or former spouse, parent or guardian, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse, parent or guardian, or by a person similarly situated as a spouse, parent or guardian.

[77] Criminal Resource Manual, *supra* note 76 (citing 142 Cong. Rec. S11872-01 (1996) (S. Lautenberg)).

The Criminal Division further explained that the Amendment "will assist in preventing those individuals who have demonstrated a propensity for domestic violence from obtaining a firearm," will "assist law enforcement by providing a tool for the removal of firearms from certain explosive situations thus decreasing the possibility of deadly violence," and "will serve as a federal prosecution tool in certain situations where alternatives have failed."[78]

Thus, at the time the bill was passed, the central agency responsible for the enforcement of federal laws recognized Congress's intent to prohibit convicted domestic violence abusers from possessing firearms.

B. If the Fourth Circuit Ruling Is Upheld, Thousands of Convicted Abusers Will Have Their Names Purged From the List of Prohibited Gun Buyers, Posing a Public Safety Crisis and Endangering Countless Families and Law Enforcement Officers Who Respond to Domestic Conflicts

The Lautenberg Amendment prevented thousands of domestic violence abusers from obtaining firearms nationwide due to the Amendment's successful interaction with the Brady Handgun Violence Prevention Act ("Brady Act"). The Brady Act required the Attorney General to "establish a national instant criminal background

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[78] *Id.*

check system that any licensee may contact . . . for information, to be supplied immediately, on whether receipt of a firearm by a prospective transferee would violate section 922 of title 18, United States Code, or State law."[79]

Pursuant to that mandate, the Attorney General established and maintains the National Instant Criminal Background Check System (NICS) within the FBI.[80] The Brady Act authorized NICS to issue a denial only if it has concluded "that the receipt of a firearm" by the prospective transferee "*would violate*" federal or state law.[81] Alternatively, NICS must issue a "proceed" if it has concluded that such receipt "would *not* violate" federal or state law.[82]

Following the Lautenberg Amendment, NICS has denied firearms to applicants convicted of misdemeanor crimes of domestic violence regardless of whether the underlying offense has as an element that the defendant was in a domestic relationship with the victim.[83] This is consistent with the

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[79] Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, § 103(b), 107 Stat. 1536, 1541 (1993).

[80] *See* 28 C.F.R. Part 25(A) (2006).

[81] 18 U.S.C. § 922(t)(1)(B)(ii) (emphasis added).

[82] 18 U.S.C. § 922(t)(2) (emphasis added).

[83] *See, e.g.*, National Instant Criminal Background Check Systems, 2001/2002 Operational Report at 23, *available at* http://www.fbi.gov/hq/cjisd/nics/oper-rpt/oper-rpt-2001-2.pdf ("Persons convicted in any court of a misdemeanor crime which has an element the use or attempted use of physical force or

definition of a "misdemeanor crime of domestic violence" contained in the Code of Federal Regulations.[84]

The Brady Act has successfully prevented domestic violence batterers from obtaining guns. In 2005, 60,237 of the total 473,433 firearms purchase denials through NICS (almost 13%) were denials to applicants previously convicted of a misdemeanor crime where the victim was in a domestic relationship with them.[85] In 2003-2004, 15% of all applicants prohibited from purchasing firearms based on criminal histories were domestic violence misdemeanants.[86] Of the 3,429 retrievals of firearms

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threatened use of a deadly weapon and the defendant was the spouse, former spouse . . . . "); Information Needed to Keep Guns out of the Hands of Persons Convicted of an MCDV," *available at* http://www.fbi.gov/hq/cjisd/nics/mcdvbrochure.pdf (describing Gun Control Act definition of "misdemeanor crime of domestic violence" as a misdemeanor that has "as an element the use or attempted use of physical force, or the threatened use of a deadly weapon"; and "[a]t the time the offense was committed, the defendant was [in a domestic relationship with] the victim").

[84] 27 C.F.R. Part 478.11 (quoted in full *supra* note 75.

[85] National Instant Criminal Background Check Systems, Operations 2005 at 11, *available at* http://www.fbi.gov/hq/cjisd/nics/ops_report2005/ops_report2005.pdf.

[86] National Instant Criminal Background Check Systems, 2003-2004 Operational Report at 10, *available at* http://www.fbi.gov/hq/cjisd/nics/ops_report2003-2004/ops_report2003-2004.pdf; National Instant Criminal Background Check Systems, 2001/2002 Operational Report at

sold in 2002, 1,052 (31%) were from persons convicted of a misdemeanor crime that was committed against a victim in a domestic relationship with the defendant where NICS uncovered evidence of the conviction after a gun was purchased.[87]

If the Fourth Circuit's position is upheld, the names of thousands of convicted domestic batterers will have to be purged from the NICS database and those convicted abusers will be allowed to purchase and possess firearms. The chilling statistics on the use of guns by domestic violence batterers, discussed *supra*, makes almost certain increased fatal and non-fatal domestic violence against victims, and the police officers who respond to protect them.

C. More Than a Decade of Congressional Acquiescence in Court Interpretations of the Lautenberg Amendment Further Demonstrates That Past Court Rulings Interpreting This Amendment Comported With Congressional Intent to Disarm Convicted Domestic Abusers

Since enactment of the Lautenberg Amendment, Congress has been aware of court rulings broadly interpreting this Amendment and statistics from

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5, *available at* http://www.fbi.gov/hq/cjisd/nics/oper-rpt/oper-rpt-2001-2.pdf..

[87] *National Instant Criminal Background Check Systems, 2001/2002 Operational Report* at 22-23, *available at* http://www.fbi.gov/hq/cjpisd/nics/oper-rpt/oper-rpt-2001-2.pdf.

NICS demonstrating the Amendment's dramatic and successful results in disarming dangerous domestic abusers.[88] Congress was also well aware of the federal regulations implemented pursuant to the Amendment. Yet, Congress has not amended the statute to reject the construction that NICS, the Code of Federal Regulations, the U.S. Attorney General and Courts of Appeals in nine circuits have given it. Moreover, Congress has amended the statute and even added to the definition of a "misdemeanor crime of domestic violence," yet has never attempted to undo the courts' interpretation of the Amendment. For example, in 2006, Congress amended the definition of "misdemeanor crimes of domestic violence" under Section 921(33)(A) to include "Tribal law," yet did not further amend the definition.[89]

This congressional inaction in the face of a clear interpretation applied by the judiciary and federal agencies administering the statute demonstrates the legislative intent of the statute and is further

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[88] *See, e.g.*, NICS Improvement Amendments Act, Pub. L. No. 2, 122 Stat 2559-2560 (2008) (Congress' findings that between Nov. 30, 1998 and Dec. 31, 2004, NICS prohibited 916,000 individuals from purchasing guns, and processed 49,000,000 Brady background checks).

[89] Violence Against Women and Dep't of Act of 2005, Pub. L. No. 109-162, § 908(a), 119 Stat 2960 (2006).

support that the Fourth Circuit has improperly construed the Amendment.[90]

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[90] *See Monessen S.W. Ry. v. Morgan*, 486 U.S. 330, 338, 108 S. Ct. 1837, 1844 (1985) (where Congress amended FELA but never amended to clarify that prejudgment interest was permissible, court upheld judicial interpretation that prejudgment interest was not available: "we have recognized that Congress' failure to disturb a consistent judicial interpretation of a statute may provide some indication that 'Congress at least acquiesces in, and apparently affirms, that [interpretation].'") (citations omitted); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 385-386 (1983) ("In light of this well-established judicial interpretation, Congress' decision to leave Section 10(b) intact suggests that Congress ratified the cumulative nature of the Section 10(b) action."); *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."); *Johnson v. Transp. Agency, Santa Clara County, Cal.*, 480 U.S. 616, 629, 107 S.Ct. 1442, 1450, n.7 (1987) ("Congress has not amended the statute to reject our construction, nor have any such amendments ever been proposed, and we therefore may assume that our interpretation was correct . . . Any belief in the notion of a dialogue between the judiciary and the legislature must acknowledge that on occasion an invitation declined is as significant as one accepted.").

CONCLUSION

For the foregoing reasons, the Court of Appeals erred in finding that 18 U.S.C. § 922(g)(9) requires the underlying misdemeanor conviction to have, as an element, proof of a domestic relationship between the perpetrator and the victim. These *amici* respectfully request that the Judgment of the Court of Appeals be reversed, and judgment be entered for Petitioners.

June 16, 2008

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UNITED STATES OF AMERICA,

Petitioner,

v.

RANDY EDWARD HAYES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF AMICUS CURIAE EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

Eagle Forum Education and Legal Defense Fund ("Eagle Forum ELDF") is an Illinois nonprofit corporation. For over twenty years it has defended principles of limited government, individual liberty, and moral virtue. To ensure the guarantees of individual liberty enshrined in our written Constitution, Eagle Forum ELDF advocates that the Constitution be interpreted according to its original meaning. Eagle Forum ELDF therefore has a strong interest in protecting the right of individuals to keep and bear arms, as set forth in the Second Amendment, and requiring Congress to adhere to the constitutional limits on its authority under the Commerce Clause. Eagle Forum ELDF also believes that the family rights of women are best defended and strengthened by maintaining jurisdiction over family law at the state, rather than the federal, level.

SUMMARY OF THE ARGUMENT

The court of appeals correctly held that Section 921(a)(33)(A)'s plain language requires that, in order for a predicate offense to constitute a "misdemeanor crime of domestic violence" ("MCDV"), it must require the government to demonstrate a domestic relationship between the perpetrator and the victim. This conclusion is compelled by the text and structure of the statute. To interpret the statute as the government advocates would require adding words and rearranging paragraphs, while essentially ignoring large portions of the statute, contrary to settled principles of statutory construction. While the debate in the proceedings

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[1] This brief is filed with the written consent of all parties. Pursuant to Supreme Court Rule 37.6, amicus states that no counsel for any party authored this brief in whole or in part, nor did any person or entity, other than amicus, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

below focused on whether the domestic relationship requirement is an "element" of the predicate offense, whether this requirement is described as its own separate "element", a "sub-element", or a necessary part of the singular "element" the government claims is described in Section 921(a)(33)(A), the fact remains that the statutory text identifies this as a requirement of the predicate offense required under Section 922(g)(9). In sum, the government's interpretation would require the Court to ignore the plain language of the statute.

Nonetheless, to the extent the Court concludes that the statute is ambiguous, settled principles of statutory interpretation warrant affirmance. While the court of appeals found that the rule of lenity requires that the predicate offense have as an element a domestic relationship between the perpetrator and the victim, other principles of statutory construction dictate the same result. This Court has repeatedly held, for example, that statutes should be interpreted to avoid reaching significant constitutional questions. Like the rule of lenity, this principle of statutory construction has an important role in guaranteeing individual liberties.

Here, this Court's recent ruling in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) raises a significant question regarding the constitutionality of Section 922(g)(9) as applied to Mr. Hayes. While the Court in *Heller* suggested that prohibiting gun ownership by felons may be constitutional given its sound footing in our nation's tradition and history, prohibiting gun ownership for *misdemeanors* is another matter. Such prohibitions raise significant constitutional concerns given the traditional distinction between felony and misdemeanor crimes. Moreover, affirming the constitutionally of a prohibition on gun ownership for misdemeanor crimes would have profound and decidedly negative practical consequences,

particularly in light of the government's expansive interpretation of Section 922(g)(9).

Likewise, it is questionable whether Congress had the authority under the Commerce Clause to enact Section 922(g)(9). The statute seeks to regulate criminal behavior within the context of domestic relationships. As this Court observed in *Morrison* and *Lopez* both are matters that were traditionally reserved to the States. The dubious constitutionality of the statute warrants a narrow interpretation, particularly given that the government's expansive interpretation would impose a federal prohibition on gun ownership for all individuals convicted of misdemeanors that happen to involve a domestic relationship, rather than allowing the states to determine whether such a prohibition should apply by defining specific crimes having as an element a domestic relationship between the perpetrator and the victim.

In addition, the government's interpretation would render the statute unconstitutionally vague and violate defendants' due process rights. If misdemeanor crimes other than those specifically targeting domestic violence are brought within the statute's scope, many misdemeanants will lack sufficient notice that they are subject to the statute's restriction on the fundamental right to bear arms. The lack of notice is particularly troubling given the retroactive effect of the statute, which raises additional constitutional concerns under the Ex Post Facto clause.

Finally, the policy arguments amici raise in support of the government's interpretation are both incomplete and irrelevant. Policy concerns cannot override the clear text of a statute or well-established principles of statutory construction. Moreover, amici ignore the significant policy concerns embodied in the Second Amendment as well as the important state concerns in regulating criminal conduct without intrusive federal intervention. While prevention of

domestic violence is a laudable goal, it is far from clear that the court of appeals' decision here is inconsistent with that end.

ARGUMENT

I. The Court of Appeals Correctly Held That the Plain Language of Section 921(a)(33)(A) Requires That The Predicate Offense Have, As An Element, A Domestic Relationship.

Under 18 U.S.C. § 922(g)(9), any person "who has been convicted in any court of a misdemeanor crime of domestic violence" is prohibited from transporting, possessing, or receiving a firearm. A "misdemeanor crime of domestic violence" ("MCDV") is defined in 18 U.S.C. § 921(a)(33)(A) as follows:

> an offense that—
>
> (i) is a misdemeanor under Federal, State, or Tribal law; and
>
> (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim[.]

The court of appeals correctly held that the "committed by" clause in sub-section (ii) modifies the clause immediately preceding it, and thus, only a criminal offense that includes a domestic relationship among its required elements may qualify as an MCDV.

A. The Court Of Appeals' Interpretation Is Consistent With The Plain Language of Section 921(a)(33)(A).

The starting point for interpreting any statute is "the language of the statute" itself. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (quoting *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992)). "[W]here the statutory language provides a clear answer," the inquiry "ends there as well." *Id.* In this instance, the text and structure of Section 921(a)(33)(A) plainly support the court of appeals' interpretation.

The heart of the dispute is whether the "committed by" phrase modifies the immediately preceding phrase, as the court of appeals held, and thus refers to the elements of the predicate crime under the applicable law, or whether it is a stand-alone characteristic of "an offense" constituting an MCDV, as the government argues, thus including as predicate offenses misdemeanors with no domestic relationship element. Several aspects of the statutory text make clear that the court of appeals' reading of the MCDV definition is correct.

First, the plain language of Section 921(a)(33)(A) requires that the predicate offense have "as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim." A straightforward reading of this text includes as "an element" a crime involving the use of force by an individual having a particular domestic relationship to the victim. The MCDV definition simply contains no restrictions or limitations on

the "has, as an element" language that precedes the domestic relationship requirement.

Second, the paragraph structure and punctuation of the statute is an important consideration in interpreting the text. *See, e.g., Int'l Primate Protection League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72, 78 (1991). The punctuation and paragraph structure of Section 921(a)(33)(A) indicate that Congress established two separate requirements, set forth in two separate sub-sections, that must be met in order for a predicate offense to be considered an MCDV: (i) the offense must be a misdemeanor under federal, state, or tribal law, and (ii) it must have, as an element, certain violent behavior committed within certain defined domestic relationships.

Third, the "grammatical rule of the last antecedent," which provides that "a limit[ed] clause or phrase ... should ordinarily be read as modifying only the noun or phrase that precedes it immediately," *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003), further bolsters the court of appeals' interpretation. Under this well-established rule of construction, the "committed by" clause in sub-section (ii) most naturally modifies the phrase immediately preceding it ("has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon"), rather than a noun that is not even part of the same sub-paragraph (the noun "offense" appearing at the beginning of the MCDV definition). Thus, the domestic relationship requirement in the "committed by" clause is expressly linked to the "has, as an element" language.

Finally, while not specifically addressed in the court of appeals' decision, another grammatical rule may be relevant here. Under the Dictionary Act, "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise ... words importing the singular include and apply to several persons, parties, or things." 1 U.S.C. § 1. Thus,

while the government argues that the term "element" is used "in the singular" (Pet. Br. at 8), even if that were true, under 1 U.S.C. § 1, the term "element" would "include and apply to" both the "use or attempted use of physical force" requirement *and* the domestic relationship requirement contained in sub-section (ii). *See, e.g., Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 665 (1979) (term "Indian" in 25 U.S.C. § 194 means the same as, and encompasses, "Indians" and thus "Indian tribes"); *Barr v. United States*, 324 U.S. 83, 91 (1945) (singular term "buying rate" used in tariff act did not preclude use of multiple "buying rates" for a particular foreign currency).[2]

The government's interpretation would require the Court to rearrange the plain language of the statute. *See* Pet. Br. at 13, 17. The government first revises the statute by moving the "committed by" language describing the domestic relationship requirement so that it immediately follows the phrase "an offense." *Id.* However, Congress specifically set the "committed by" language apart from the phrase "an offense", and placed it in a paragraph that begins "that has, as an element," thereby making clear that a domestic relationship is a necessary element of the predicate offense. The government next inserts a hard paragraph break where none exists, removing the "committed by" clause from sub-section (ii) of the statute. *Id.* at 17. However, Congress specifically chose to incorporate the "committed by" clause in the sub-section describing the requisite elements of the predicate offense. Finally, the government's construction

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[2] This provision likewise has been ignored by courts holding that the predicate offense need not have as an element a domestic relationship, many of which have relied heavily on the notion that the term element is used in the "singular". *E.g., United States v. Meade*, 175 F.3d 215, 218-19 (1st Cir. 1999); *United States v. Smith*, 171 F.3d 617, 620 (8th Cir. 1999); *United States v. Barnes*, 295 F.3d 1354, 1362 (D.C. Cir. 2002) (collecting cases finding "use of the singular 'element' rather than 'elements' determinative").

would require the Court to ignore the last antecedent rule, even though that rule is a well-accepted cannon of construction.

More fundamentally, the government's reading of the statute would in effect require the Court to ignore large portions of the statutory text. The statute specifically describes the predicate offense as having "as an element, [a particular domestic relationship] with the victim." Whether the language describing the domestic relationship is characterized as its own separate "element", a "sub-element", or a necessary part of the singular "element" in the statute under the government's interpretation (*id.* at 8), there can be no dispute that it is a requirement of the predicate offense specifically stated in the statutory text. *See Barnes*, 295 F.3d at 1369 (Sentelle, J., dissenting) (at bottom, the "argument ... is not how many elements are involved, but what the singular element is"). The government's interpretation would effectively read this language out of the statute contrary to settled principles of statutory construction. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001).

B. The Limited Legislative History Supports The Court Of Appeals' Interpretation.

As the government concedes, "it is not necessary to go beyond the text of the statute in answering the question presented." Pet. Br. at 8. Indeed, this Court has made clear that legislative history "cannot amend the clear and unambiguous language of a statute." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 457 (2002). Such reliance is particularly unwarranted here given that the MCDV definition "was ultimately passed as part of a last minute series of congressional maneuvers," "neither the House nor the statute held hearings on the statute," and "the legislative

history concerning the statute is sparse." *United States v. Hartsock*, 347 F.3d 1, 5 n.4 (1st Cir. 2003).[3]

Nonetheless, to the extent the legislative history is useful at all, it supports the court of appeals' interpretation of the statute. Thus, for example, the bill's sponsor Senator Lautenberg stated that "[t]he amendment would prohibit any person *convicted of domestic violence* from possessing a firearm." 142 Cong. Rec. 22,988 (1996) (emphasis added). Likewise, in advocating for the bill, Senator Feinstein stated that it was designed to remedy the "unfortunate fact that many *domestic violence offenders* are never convicted of a felony" and therefore are not subject to the laws that "prohibit convicted felons from possessing a firearm" and that "[o]utdated or ineffective laws often treat *domestic violence* as a lesser offense." *Id.* (emphasis added). Such statements suggest that the drafters intended to impose a prohibition on gun ownership only on those who committed the specific crime of "domestic violence"—i.e., a crime for which a domestic relationship was a necessary element.

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[3] The lack of any meaningful legislative history is a result of the unusual way in which § 922(g)(9) was enacted. Eric Andrew Pullen, comment, *Guns, Domestic Violence, Interstate Commerce, and the Lautenberg Amendment*, 39 S. TEX. L. REV. 1029, 1037-38 (1998) (noting "undetectable fashion" in which "this controversial legislation became law"). As the government acknowledges, § 922(g)(9) was initially an amendment to an anti-stalking bill. However, Senator Lautenberg subsequently offered the bill as an amendment to a Treasury and Postal Service appropriations bill, which was subsequently subsumed within the Omnibus Consolidated Appropriations Act. Pet. Br. at 28. Thus, the amendment was slipped into an appropriations bill at the eleventh hour after being amended "shortly beforehand." *Id.* at 29. Moreover, "[m]any in Congress were unaware the Lautenberg Amendment was present when they voted on the bill because Senator Lautenberg requested the Presiding Officer to dispense with the reading of his amendment." Pullen, *supra*, at 1037-38.

In the face of this history, the government and amici rely upon a lone statement by Senator Lautenberg, who noted that "convictions for domestic violence-related crimes often are for crimes, such as assault, that are not explicitly identified as related to domestic violence." 142 Cong. Rec. 26,675 (1996). That statement is notable for its uniqueness in the debates and the fact that it was made at the eleventh hour. Taken as a whole, the sparse legislative history indicates that Congress contemplated that the predicate offense in Section 922(g)(9) was one that specifically criminalized "domestic violence". In any event, this Court has underscored that such statements by "a single legislator who sponsors a bill" are "not controlling in analyzing legislative history." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980). *Accord Weinberger v. Rossi*, 456 U.S. 25, 35 n.15 (1982) ("The contemporaneous remarks of a sponsor of legislation are certainly not controlling in analyzing legislative history."). This principle applies with even greater force where, as here, it appears that the relevant language was inserted at the request of *opponents* of the original legislation. *See* Resp. Br. at 30; Lautenberg Br. at 17-18. Accordingly, to the extent the legislative history is helpful at all, it further supports the court of appeals' interpretation.

II. The Well-Settled Principle Of Constitutional Avoidance Warrants Affirmance.

Were there any ambiguity in the statute, however, it would be resolved by settled principles of statutory construction.[4] While the court of appeals correctly held that

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[4] Several of the courts holding that a domestic relationship is not a required element of the predicate offense under § 922(g)(9) have nonetheless conceded that the contrary reading "has some force," *United States v. Belless*, 338 F.3d 1063, 1067 (9th Cir. 2003), and that the statute is "not a model of clarity or preciseness," *United States v. Heckenliable*, 446 F.3d 1048, 1050 (10th Cir. 2006).

the rule of lenity would require reversal of Mr. Hayes' conviction were there any ambiguity in the statutory text, another principle of statutory construction is equally applicable. This Court has made clear that statutes should be construed to avoid constitutional questions where possible. Here, the government's interpretation raises several constitutional concerns. Most immediately, there is a significant issue regarding the constitutionality of Section 922(g)(9) in the wake of this Court's decision in *Heller*. While the Court in *Heller* suggested that, consistent with our nation's tradition and history, restrictions on gun ownership by convicted felons may be constitutional, prohibitions on gun ownership for *misdemeanors* have no such historical pedigree. Likewise, there are significant questions regarding congressional authority to enact such legislation under the Commerce Clause. As this Court made clear in *United States v. Morrison*, 529 U.S. 598 (2000), such non-economic, criminal legislation is constitutionally questionable. Finally, the government's interpretation has the potential to render the statute unconstitutionally vague: if misdemeanor crimes other than those specifically targeting domestic violence are brought within the statute's scope, many misdemeanants will lack sufficient notice that they are subject to the statute's restriction on gun ownership. This constitutional concern is compounded by the fact that Section 922(g)(9) applies retroactively to those such as Mr. Hayes who committed misdemeanors before the statute's enactment in 1996. Thus, adopting the government's proposed interpretation would raise significant constitutional questions.

A. Statutes Should Be Interpreted, Where Possible, To Avoid Serious Constitutional Doubts.

"'[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.'" *Jones v. United States*, 526

U.S. 227, 239 (1999). In order to apply the doctrine of constitutional avoidance, it is not necessary for the Court to determine whether an asserted constitutional question has merit, as the avoidance canon is intended to "allow[] courts to *avoid* the decision of constitutional questions." *Clark v. Martinez*, 543 U.S. 371, 381 (2005). Instead, the doctrine applies where one interpretation of a statute "engenders constitutional issues" while "a reasonable alternative interpretation" avoids those constitutional questions. *Gomez v. United States*, 490 U.S. 858, 864 (1989). Indeed, this Court has often applied the avoidance canon in situations where it later *rejected* the alleged constitutional deficiency. *See* Adrian Vermuele, *Saving Constructions*, 15 GEO. L.J. 1945, 1960-61 (1997).

B. The Fundamental Second Amendment Right At Stake Warrants A Narrow Reading of Section 922(g)(9).

"[T]he Second Amendment confer[s] an individual right to keep and bear arms" comparable to the First Amendment right of free speech. *Heller*, 128 S. Ct. at 2799.[5] "[C]entral to the Second Amendment right" is "the inherent right of

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[5] For example, John Locke maintained that the right to armed self-defense was "so necessary to, and closely tied with, a man's preservation, that he cannot part with it but by what he forfeits his preservation and life together." JOHN LOCKE, SECOND TREATISE ON GOVERNMENT 23 (1690) (reprinted Hackett ed. 1980). William Blackstone recognized that the right to bear arms in the English Bill of Rights acknowledged "the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression." 1 WILLIAM BLACKSTONE, COMMENTARIES *143-44. And St. George Tucker described the Second Amendment as equivalent to Blackstone's "right of self-defence [which] is the first law of nature." 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES 143, 300 (1803). Consistent with this view, *Federalist No. 28* recognizes an "original right of self-defense which is paramount to all positive forms of government." THE FEDERALIST NO. 28, at 178.

self-defense," especially in "the home, where the need for defense of self, family, and property is most acute." *Id.* at 2817.[6]

The indictment under appeal strikes directly at Mr. Hayes's fundamental Second Amendment rights, as it seeks to criminalize his possession of firearms in his home. Pet. Br. at 4. While the Second Amendment right to bear arms is "not unlimited, just as the First Amendment's right of free speech [is] not," nonetheless regulation of that right must not exceed the bounds set by the Constitution. *Id.* at 2799. Thus, for example, in *Heller* while the Court indicated that "longstanding prohibitions on the possession of firearms by felons and the mentally ill" may be constitutionally permissible, the Court cited no such historical pedigree for the prohibition on firearms ownership by *misdemeanants*. *Id.* at 2816-17; *see also United States v. Booker*, -- F. Supp. 2d --, 2008 WL 3411793, at *1 (D. Me. Aug. 11, 2008) (*Heller* left open the "significant question" of whether 18 U.S.C. § 922(g)(9) is constitutional). To the contrary, "[u]nlike felons, there is no tradition in United States or English law of depriving misdemeanants of civil rights or barring misdemeanants from gun possession." Congressional Research Service, Gun Ban for Persons Convicted of Misdemeanor Crime of Domestic Violence: Ex Post Facto Clause and Other Constitutional Issues 5 (Dec. 30, 1996) (reviewing constitutional questions raised by 922(g)(9)).

This distinction between felonies and misdemeanors is fundamental to the criminal law. It has deep roots in our nation's history and traditions, with significant implications

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[6] Given the "fundamental" nature of the right, which is "'deeply rooted in this Nation's history and tradition,'" strict scrutiny is warranted. *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997); *Elrod v. Burns*, 427 U.S. 347, 363 (1976) (first amendment interests subject to strict scrutiny).

for the types of process that are afforded defendants, and the types of punishments that may be fairly imposed. *Apprendi v. New Jersey*, 530 U.S. 466, 480 n.7 (2000); *United States v. Watson*, 423 U.S. 411, 418-20 (1976); William A. Schroeder, *Warrantless Misdemeanor Arrests and the Fourth Amendment*, 58 MO. L. REV. 771, 812 (1993). No one would suggest, for example, that individuals could be constitutionally subject to permanent deprivation of the right to own firearms (or for that matter, any other fundamental right, such as the right to exercise free speech) simply because they have been convicted for the misdemeanor crime of littering or jaywalking.

These concerns are amplified by the government's expansive interpretation of Section 922(g)(9). As a threshold matter, the government has interpreted Section 922(g)(9) to apply *retroactively*, such that individuals who may have chosen not to contest misdemeanor charges and did not realize at the time that they may be forfeiting their Second Amendment rights may find themselves deprived of a fundamental constitutional right. 63 Fed. Reg. 35,521 (June 30, 1998). In addition, the government has interpreted the statute to apply to individuals whose misdemeanor offenses were not punishable by imprisonment, but rather only a fine, as well as to individuals who have been previously convicted in states that do not "characterize offenses as misdemeanors." *Id.* at 35,520-21. Finally, according to the government, the statute may be applied to individuals convicted of a wide range of offenses ranging from "generic assault" to "disorderly conduct." Information Needed to Keep Guns Out of the Hands Of Persons Convicted of an MCDV, *available at http://www.fbi.gov/hq/cjisd/nics/mcdvbrochure.pdf*. Indeed, in the present suit, the government has construed the statute to apply where the predicate offense may reach not only those who cause another "physical harm", but any individual

who "unlawfully and intentionally makes physical contact of an insulting or provoking nature." W.Va. Code § 61-2-9(c).

Given the serious constitutional issues raised by the prosecution of Mr. Hayes, and the ability to avoid those issues by adopting the court of appeals' reasonable construction of Section 921(a)(33)(A), the canon of constitutional avoidance further supports affirmance. *See, e.g., United States v. Kitsch*, 2008 WL 2971548, at *7 (E.D. Pa. Aug. 1, 2008) (applying canon of constitutional avoidance in interpreting 922(g)(1) to "avoid[] potential doubts post-*Heller* about the statute's constitutionality").

C. The Constitutional Limits On Congressional Authority Under The Commerce Clause Warrant A Narrow Reading Of Section 922(g)(9).

A further substantial constitutional issue is raised by the application of Section 922(g)(9) to Mr. Hayes's intra-state possession of a firearm—namely, whether Section 922(g)(9) exceeds the scope of congressional authority under the Commerce Clause. The factors this Court articulated in *Morrison* and *Lopez* demonstrate that there is a significant question regarding congressional authority to enact Section 922(g)(9), which may be avoided by adopting the court of appeals' construction of the statute.

First, Section 922(g)(9) is "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *United States v. Lopez*, 514 U.S. 549, 561 (1995). Neither gun possession nor gender-motivated acts of violence qualify as economic activity. *Morrison*, 529 U.S. at 613; *Lopez*, 514 U.S. at 561. Accordingly, Section 922(g)(9) raises significant constitutional concerns. As this Court observed in *Morrison*, "a fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to [the Court's] decision in that case." 529 U.S. at 610.

Second, although Section 922(g)(9) does have a jurisdictional element that may "lend support" to the constitutionality of the statute, *id.* at 612-13, this factor cannot save a statute that, like Section 922(g)(9), reaches far into "areas of traditional state regulation" such as criminal and family law. *See id.* at 615-16; *Lopez*, 514 U.S. at 561 n.3. "Under our written Constitution, ... the limitation of congressional authority is not solely a matter of legislative grace." *Morrison*, 529 U.S. at 616.[7] Moreover, that same jurisdictional element counsels in favor of a narrow construction of Section 922(g)(9) to reach only that "discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce." Here, it is difficult to see how such a "case-by-case inquiry" would demonstrate any effect on interstate commerce. *See Lopez*, 514 U.S. at 561-62.

Third, the sparse legislative history of Section 922(g)(9) is devoid of congressional findings demonstrating any effects on interstate commerce of gun possession by individuals previously convicted of a crime of domestic violence. *See Morrison*, 529 U.S. at 612. "While 'Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce,' ... the existence of such findings may 'enable [the Court] to evaluate the legislative judgment that the activity in question substantially affect[s] interstate commerce, even though no such substantial effect [is] visible to the naked eye." *Id.* (quoting *Lopez*, 514 U.S. at 563). There are no such findings here because, like the possession of guns in a school zone at

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[7] Thus, in *Morrison*, the Court held that the fact that Congress expressly prohibited 42 U.S.C. § 13981 "from being used in the family law context" could not save the statute. 529 U.S. at 616. Moreover, here, the legislation specifically *targets* conduct occurring within a domestic relationship and thus the constitutional concerns are even greater.

issue in *Lopez* and the gender-motivated crime at issue in *Morrison*, there is simply no effect on interstate commerce.

Finally, as the Court observed in *Morrison*, "the link between gun possession and a substantial effect on interstate commerce [is] attenuated." 529 U.S. at 612. While the government argued in *Lopez* that violent crime imposed costs on society that are substantial and reduced the willingness of individuals to travel to areas within the country that are perceived to be unsafe, the Court "rejected these 'costs of crime' and 'national productivity' arguments because they would permit Congress to 'regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce.'" *Id.* at 612-13 (quoting *Lopez*, at 514 U.S. at 564). As the Court explained, such arguments would effectively eviscerate the traditional regulatory authority of the states in areas such as family law and criminal law enforcement:

> "Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the[se] theories ..., it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate."

Id. at 613 (quoting *Lopez*, 514 U.S. at 564). That is exactly the effect of Section 922(g)(9) here, where the government seeks to impose additional penalties on conduct that by definition involves criminal activity within the context of a domestic relationship—an area this Court has repeatedly affirmed lays within the traditional scope of state regulation.

In sum, the Court has "reject[ed] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce" on the ground that "[t]he Constitution requires a distinction between what is truly national and what is truly local." *Morrison*, 529 U.S. at 617-18. Indeed, the Court has found "no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *Id.* at 618.[8]

D. The Government's Construction Would Render Section 922(g)(9) Unconstitutionally Vague And Violate The Fifth Amendment Right To Due Process.

Finally, the government's construction of the statute would render it unconstitutionally vague and violate Mr. Hayes's right to due process. *See United States v. Harriss*, 347 U.S. 612, 617 (1954) ("The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute."); *Lambert v. California*, 355 U.S. 225 (1957). Under the government's proposed construction, Section 922(g)(9) may be applicable to individuals whose predicate offense does not mention domestic violence at all, much less require the government to demonstrate a domestic relationship as an element. Indeed,

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[8] While lower courts have rejected Commerce Clause challenges, they have relied heavily on the presence of a jurisdictional element in § 922(g)(9), which this Court made clear in *Morrison* is not dispositive of the Commerce Clause analysis. *See, e.g., Gillespie v. City of Indianapolis*, 185 F.3d 693, 704 (7th Cir. 1999) ("inclusion of that jurisdictional element" is "sufficient to overcome Commerce Clause challenges"); *Fraternal Order of Police v. United States*, 173 F.3d 898, 907 (D.C. Cir. 1999); *United States v. Daugherty*, 264 F.3d 513 (5th Cir. 2001).

the government contemplates that there will be judicial proceedings perhaps years after the fact involving "the presentation and weighing of proof, and a finding of guilt beyond a reasonable doubt" by a jury to adjudicate whether the predicate offense constitutes a "crime of domestic violence." Pet. Br. at 10-11. Under such circumstances, many criminal defendants such as Mr. Hayes who were not convicted under statutes that specifically mentioned domestic violence may not be placed on notice that they are subject to the restrictions of 922(g)(9). Not only is such a construction of the statute at odds with common sense, but it also raises serious constitutional concerns. *See Belless*, 338 F.3d at 1067 (Congress "may have intended to limit predicate offenses to those with a domestic element ... to avoid questions years later about what the relationship might have been between the perpetrator and the victim").

The potential due process implications are compounded by the fact that the government has construed Section 922(g)(9) as having retroactive effect. While several lower courts have held that Section 922(g) does not violate the Ex Post Facto clause,[9] a critical rationale underlying these decisions is that the defendants had *notice* that their possession of a firearm could result in additional criminal sanctions. Thus, for example, several courts have relied on the Second Circuit's decision in *United States v. Brady*, 26 F.3d 282 (2d Cir. 1994), upholding the felon-in-possession statute in the face of a similar challenge on the ground that the defendant "had more than adequate notice that it was illegal for him to possess a firearm because of his status as a convicted felon" and thus "could have conformed his conduct to the requirements of the law." *Id.* at 291. In affirming the constitutionality of the statute, the court observed that "[o]ne of the principal aims of the Ex Post

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[9] *See, e.g., United States v. Hemmings*, 258 F.3d 587, 594 (7th Cir. 2001); *United States v. Mitchell*, 209 F.3d 319, 322-23 (4th Cir. 2000).

Facto clause is to ensure that individuals have fair notice of what conduct is criminally prescribed." *Id.*

Here, however, the government's interpretation would severely undermine this rationale. Unlike the defendant in *Brady* who was put on notice of the predicate offense because it was expressly classified as a "felony", individuals such as Mr. Hayes would be subject to prosecution under Section 922(g)(9) even though a domestic relationship was not an element of the predicate offense and, indeed, may not have been relevant at all in the proceedings that resulted in the prior conviction. Such a result would significantly undermine the constitutionality of the statute.[10]

Indeed, the Congressional Research Service has concluded more broadly that "[t]he law may be vulnerable to an *ex post facto* challenge if," as here, "prosecution is attempted against a person in lawful possession of a firearm before the effective date who merely continues possession of the same firearm after the effective date without any notice of the change in the law." CRS, *supra*, at 1. "Although knowledge of the law is not ordinarily a defense to criminal behavior, when the law departs from the traditional distinction between misdemeanors and felons, the fair notice principle underlying the *ex post facto* clause may apply." *Id.* at 6. Given that "there is no tradition in United States or English law of depriving misdemeanants of civil rights or

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[10] While the lower courts have relied heavily on the notice element, it is unclear that such "notice" can cure the constitutional defect under this Court's precedents. The Court has held that the Ex Post Facto clause is violated where "the law changes the legal consequences of acts completed before its effective date" by, for example, retroactively increasing the punishment for a criminal act. *Weaver v. Graham*, 450 U.S. 24, 31 (1981). That is the case under § 922(g)(9), which imposes new criminal sanctions—i.e., deprivation of the fundamental right to bear arms—retroactively to individuals who may have been convicted of misdemeanors decades before enactment of the statute.

barring misdemeanants from gun possession," such individuals would not have "fair warning" that their misdemeanor convictions might deprive them of the right to bear arms. *Id.*

The problems inherent in the government's interpretation are illustrated by *White v. Department of Justice*, 328 F.3d 1361 (Fed. Cir. 2003), where the court rejected a vagueness challenge even though the petitioner had been *acquitted* under the Virginia misdemeanor crime of domestic violence statute but convicted of simple assault. Given that he had been *acquitted* under the statute specifically containing the domestic relationship element, was informed by the Virginia State Police that he could carry a weapon, and successfully purchased one, the defendant reasonably believed that he was not subject to Section 922(g)(9). Nonetheless, the court held that he was indeed subject to the statute, which the court found was not unconstitutionally vague, simply asserting "we see no ... problem with this statute." *Id.* at 1368 & n.3.[11]

The court's decision in *White* also illustrates another potential constitutional problem with the government's interpretation. The Fifth Amendment right to due process and Sixth Amendment right to trial by an impartial jury "indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.'" *Apprendi*, 530 U.S. at 476-77. In Mr. White's case, however, he was deprived of his position as a correctional officer even though no jury ever made a finding establishing the domestic relationship element, and indeed the count

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[11] Some lower courts have rejected similar challenges, although often with little or no analysis. *See, e.g., United States v. Kavoukian*, 315 F.3d 139, 145 (2d Cir. 2002); *United States v. Pfeifer*, 371 F.3d 430 (8th Cir. 2004); *Barnes*, 295 F.3d at 1363; *Meade*, 175 F.3d at 222.

against him containing that element was dismissed. Thousands of individuals are in the same position given that Section 922(g)(9) dispenses with the public interest exception for members of the military and law enforcement that is applicable to other gun control provisions (such as those applicable to felons in possession of a firearm). 18 U.S.C. § 925(a)(1). Because such individuals must carry a weapon as a condition of their employment, they may be summarily dismissed if they are deemed subject to the restrictions in Section 922(g)(9).[12] In addition, many more individuals will be prohibited from purchasing a firearm under the Brady Act even though, under the government's interpretation, no jury need ever have found that the domestic relationship element was satisfied. Brady Center Br. at 35.

III. The Recitation Of Policy Concerns Amici Raise Is Incomplete And Irrelevant.

Finally, the policy arguments amici raise in defense of the government's interpretation are both incomplete and irrelevant. *See* Brady Center Br. at 8-35. This Court has made clear that its role "is not to make policy, but to interpret a statute." *Neitzke v. Williams*, 490 U.S. 319, 326 (1989). *See also Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) ("'[O]ur role is too interpret the intent of Congress ..., not to make a freewheeling policy choice.'"). Indeed, the Court recently rejected similar policy-based arguments in

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[12] This aspect of the law can lead to absurd and inequitable results by, for example, depriving a "soldier who slaps her husband, who is convicted for simple battery in state court" of the right to carry Army-issued firearms, while a "soldier who severely beats his wife, who is convicted of a felony ... would still be able to carry a weapon legally in the Army under the umbrella of the Government Exception." E. John Gregory, *The Lautenberg Amendment: Gun Control in the U.S. Army*, ARMY LAWYER 1 (Oct. 2000), *available at* http://findarticles.com/p/articles/mi_m6052/is_2000_Oct/ai_71829233.

Heller, observing that they had been taken "off the table" by the "enshrinement" of the individual right to keep and bear arms in the Second Amendment. *Heller*, 128 S. Ct. at 2822. "The very enumeration of the right takes out of the hands' of the government ... the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Id.* at 2821 (emphasis in original).

Even if such concerns were a proper subject for this Court's consideration, however, the list of policy concerns articulated by amici presents an incomplete picture. Amici completely ignore the significant policy considerations embodied in the Second Amendment—the belief among the Framers that the right to bear arms was fundamental and provided an important bulwark against government overreaching. Nor do they address the important federalism concerns that are raised by the court of appeals' decision. As this Court has recognized, criminal and family law are areas that historically have been regulated by the states. *See Lopez*, 514 U.S. at 561 n.3. Accordingly, far from being problematic (Pet. Br. at 22-27), allowing states to retain control over the appropriate remedies for crimes of domestic violence may have significant positive benefits, allowing states to develop alternative approaches to address a critical problem.[13]

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[13] Nor would the court of appeals' interpretation "fundamentally undermine[] the consistent application of federal law." Pet. Br. at 27. Under the court of appeals' interpretation, there is in fact a consistent federal rule, which says that if a state chooses to enact a statute criminalizing domestic violence, federal law will prohibit individuals convicted under such statutes from possessing firearms. That rule can be applied consistently and equally to all the states. *Cf. United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979) (refusing to impose uniform federal rule for priority of liens, holding that under federal law, state-law rules regarding priority of liens govern); *United States v. Sharpnack*, 355 U.S. 286, 293 (1958) (discussing various federal criminal statutes that define federal offenses based on state law). Moreover, the government's assertion that Congress was even attempting to create such uniformity is

The court of appeals' interpretation of the statute gives due consideration to these concerns by leaving with the states the power to define whether additional penalties should be placed on domestic abusers by defining specific crimes targeting domestic abuse. Those states that wish to take advantage of Section 922(g)(9) and impose additional punishment may specifically criminalize crimes of domestic violence. Those states that do not wish to impose such punishment may refrain from enacting such specific laws (which has been the choice of approximately half the states to date, Brady Center Br. at 7; Pet. Br. at 9). The court of appeals' decision therefore has the benefit of protecting the traditional role of the states in defining the scope of criminal liability for individuals within their jurisdictions. *See Belless*, 338 F.3d at 1067 (Congress "may have intended to limit predicate offenses to those with a domestic element ... to spur states to pass statutes that expressly focus on domestic violence.").

The government's interpretation, in contrast, would remove the policy determination from the hands of the states. States that have chosen not to specifically criminalize domestic violence may believe that special legislation is not needed in order to address the relevant policy concerns, that it is ineffective, or that such legislation would trigger restrictions on gun ownership that are constitutionally

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belied by the record. Under the statute, for example, "[w]hether a person has been 'convicted' of a misdemeanor crime of domestic violence is determined by the law of the jurisdiction where the proceedings were held." 63 Fed. Reg. 35,521 (June 30, 1998). Accordingly, Congress sought to preserve the traditional role of the states in defining the parameters of criminal liability, rather than imposing a uniform rule in all the states. Adam W. Kersey, *Misdemeanants, Firearms, and Discretion: The Practical Impact of the Debate Over "Physical Force" and 18 U.S.C. § 922(g)(9)*, 49 WM. & MARY L. REV. 1901, 1931 (2008) ("Section 922(g)(9) is a product of the infusion of state substantive law into the federal criminal process.").

questionable. Amici's preferred policy determination should not be forced on such states.

Even if the only policy considerations at issue were those amici raise, however, the evidence they have submitted is of dubious relevance. None of the evidence amici cite actually shows that their interpretation would lead to any significant increase in the efficacy of Section 922(g)(9) compared to the court of appeals' interpretation. Amici do not cite a single study that specifically examines the efficacy of Section 922(g)(9), much less one that compares the effects of the court of appeals' interpretation of the MCDV definition to the government's proposed definition.

In fact, the court of appeals' interpretation is likely to have little practical effect. The court of appeals' decision does not render inapplicable Section 922(g)(9)'s prohibition on gun ownership in all circumstances. It only does so where state legislatures choose not to enact specific statutes criminalizing crimes of domestic violence (and only as to individuals who did not commit a specific domestic violence crime or are not already prohibited from owning firearms because they, for example, have committed felonies). Individuals who committed misdemeanor crimes of domestic violence or who committed a felony offense *will* be prohibited from owning firearms. Brady Center Br. at 7; Pet. Br. at 9.

Moreover, the court of appeals' interpretation would only impact the minority of domestic abusers who have actually been convicted of a predicate offense. Even the proponents of Section 922(g)(9) recognized that the statute—no matter how it is interpreted—would not have a significant effect on the underlying problem due to the limited prosecution of domestic violence. Thus, for example, Senator Murray, one of the co-sponsors of the original bill stated: "Unfortunately, this amendment will not make life better for many women who are abused, even when guns are present in the home.

We know that most domestic violence is not even reported, and of the cases that are reported, many do not lead to a conviction. This is a problem associated with the horrible effects of victimization, and has a different set of solutions." 142 Cong. Rec. 22,987 (1996). As Senator Murray observed, the vast majority of domestic violence incidents are never reported. Of those that are reported, the vast majority do not lead to conviction. Accordingly, the threshold requirements for Section 922(g)(9) are seldom satisfied.

In addition, the materials amici cite indicate that there are significant questions regarding the enforcement, and enforceability, of Section 922(g)(9). Commentators universally note that there have been very few prosecutions under the statute. *See, e.g.*, Emily F. Rothman, *Batterers' Use of Guns to Threaten Intimate Partners*, 60 J. AM. MED. WOMEN'S ASS'N 62, 67 (2005) ("as of 2001, only 566 batterers in the United States had been prosecuted for violating the statutes"); Tom Lininger, *A Better Way To Disarm Batterers*, 54 HASTINGS L.J. 525, 530-32 (2003) (observing that "enforcement problems persist under section 922(g)(9)" and that there is a "low rate of prosecution").

Moreover, while amici suggest that "[t]he Lautenberg Amendment prevented thousands of domestic violence abusers from obtaining firearms nationwide due to the Amendment's successful interaction with the Brady Handgun Prevention Act" and its criminal background check system (Brady Center Br. at 32-33), the materials they cite conclude that "[t]he background check system itself is currently subject to deficiencies that can work to criminals' advantage." Rothman, *supra*, at 67. As a threshold matter, domestic abusers or others subject to the Brady law may simply obtain weapons from private owners, or illegally, which is apparently a common means of circumventing the

Act.[14] As the materials amici cite acknowledge, the seminal study on the Brady Act, published in the *Journal of the American Medical Association*, found that the law has had no detectable impact on homicide rates.[15] Thus, while amici note that thousands of individuals have been denied hand guns by *federally licensed dealers* under the Brady law, they cannot claim that this has had any effect on gun acquisition in the secondary market or actual crime rates.

The problems with respect to domestic abusers are even more acute. As the studies amici cite acknowledge, even where a background check applies, it may not prevent such individuals from obtaining a handgun for a variety of reasons, including the difficulty of identifying crimes of "domestic violence" from misdemeanor records, incomplete and unclear state recordkeeping, misclassification of cases of

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[14] Garen Wintemute et al., Violent Prevention Research Program, *Effectiveness of Denial of Handgun Purchase by Violent Misdemeanants*, at 42 (May 29, 2002), available at http://www.ncjrs.gov/pdffiles1/nij/grants/197063.pdf ("perhaps 40% of all firearm transfers" are by private vendors not subject to Brady law).

[15] *See* Wintemute, *supra*, at 46 ("a recent evaluation of the impact of the Brady Handgun Violence Prevention Act ... did not detect an effect on criminal violence," citing J.A. Ludwig & P.J. Cook, *Homicide and Suicide Rates Associated with Implementation of the Brady Handgun Violence Prevention Act*, 284 JAMA 585 (2000)). As Professor Bogus, a member of the governing board of the Brady Campaign or its legal action arm from 1987 to 1993, has observed, while "[t]he Brady Campaign has since touted the purported effectiveness of the legislation," the 2000 *JAMA* study found "'no detectable difference in homicide trends between the 'Brady' (treatment) and 'non-Brady' (control) states.'" Carl T. Bogus, *Gun Control and America's Cities: Public Policy and Politics*, 1 ALB. GOV'T L. REV. 440, 459-60 (2008). Indeed, "[e]ven before it was enacted, few people expected [the Brady law to] have a significant impact on homicide rates." *Id.* at 468 & n.127. The National Academy of Sciences has likewise concluded that "the Brady act had no direct effect on homicide rates." NRC, Firearms and Violence: A Critical Review 94 (2005).

domestic violence, the limited time available to perform the background check, and "problems with the federal definition of domestic violence conviction":

> As of 2003, gun retailers in 31 states lacked the ability to distinguish batterers from others because they could not identify misdemeanor convictions for partner violence consistently through background checks. Reasons for this include incomplete or unclear state record keeping, lack of automated systems, insufficient resources, and problems with the federal definition of domestic violence conviction. Another reason for the failure of the background check system may be that domestic violence cases are misclassified. A recent study of domestic violence arrests made in Arizona from 2000 to 2002 found that 54% were misclassified, allowing some offenders to retain their firearms after arrest.

Rothman, *supra*, at 67. Thus, the General Accounting Office found that thousands of domestic abusers were able to obtain firearms from *federally-licensed dealers*, despite the background check system.[16] In addition, the Brady law does nothing to prevent domestic abusers from retaining weapons they already possessed. *Id.*

Thus, even under amici's suggested interpretation, the statute would have little positive effect. Indeed, by its own admission, the government is often unable to ascertain who is subject to Section 922(g)(9) given its vague approach to the domestic relationship requirement, which does not limit

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[16] The GAO report documented many of the same problems contributing to the "difficulty in preventing domestic violence offenders from purchasing firearms." GAO, Gun Control: Opportunities to Close Loopholes in the National Instant Criminal Background Check System 3-4 (2002).

predicate offenses to actual crimes of domestic violence, but expands it to misdemeanors lacking a domestic relationship element. *See* GAO Report, *supra*, at 27 ("domestic violence offenses may not always be clearly labeled as domestic violence, and the complex federal definition of domestic violence misdemeanor requires obtaining information that may not be immediately available in the state criminal history record"). Moreover, the haphazard way in which the statute is enforced raises significant concerns regarding fairness and equality in the deprivation of a constitutional right that this Court has recently confirmed to be fundamental.

Lacking evidence of any significant benefit resulting from the government's interpretation of the statute, amici instead argue generally in favor of removing guns from as many people as possible, or as many misdemeanants as possible, or as many potentially abusive people as possible, asserting that "prohibiting violent misdemeanants from possessing firearms is associated with a specific decrease in the risk of arrest for new firearm crimes and violent crimes." Brady Center Br. at 10 (citing Wintemute, *supra*, at 2).[17]

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[17] Thus, for example, the primary study upon which amici rely, Wintemute et al., did not examine § 922(g)(9), or even a similar state statute, but rather violent misdemeanants generally. Wintemute, *supra*, at 1, 4. Moreover, while amici suggest the study definitively shows that preventing violent misdemeanants from obtaining guns reduces crime, the study only found a very minor effect under certain specific conditions (blocking gun sales to violent misdemeanants reduced new gun and/or violent crime by only 3.8%, *id.* at 37). Accordingly, the National Academy of Sciences recently concluded after reviewing the study and other evidence that, while implementing screening procedures for violent misdemeanants may "prevent prohibited persons from making gun purchases in the primary market, the question remains what, if any effect, it has on purchases in the secondary market, on gun crimes, and on suicide." NRC, *supra*, at 94.

Not only are such assertions highly questionable for the reasons stated above, but they also prove too much. This Court has already rejected the argument that constitutional guarantees embodied in the Second Amendment can be overridden by the fear that individuals may abuse their constitutional rights. *Heller*, 128 S. Ct. at 2821-22. Indeed, the same arguments might be proffered in support of depriving all male citizens of the right to bear arms given that males commit the vast majority of violent crime in the United States (including domestic violence and gun crimes). *See* Brady Center Br. at 5. An across-the-board ban of private firearm possession would theoretically be even more effective (although the experience in the District of Columbia and other jurisdictions certainly proves that, as a practical matter, such bans are ineffective).

At bottom, amici's argument boils down to an assertion that we cannot be trusted to responsibly exercise our constitutional liberties. However, the remedy for such dangers is not to prospectively deprive us of our constitutional freedoms, but rather to impose reasonable criminal or civil sanctions on individuals who are charged with, and convicted of, crimes.

CONCLUSION

For the foregoing reasons, the court of appeals' decision should be affirmed.

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AMICUS CURIAE BRIEF

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UNITED STATES,

Petitioner,

v.

RANDY EDWARD HAYES,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF AMICUS CURIAE OF GUN OWNERS FOUNDATION IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

Gun Owners Foundation ("GOF") (www.gunowners.com) was established as a nonprofit corporation in the Commonwealth of Virginia in 1983. GOF engages in nonpartisan research, study, analysis and education regarding, *inter alia*, the ownership and use of firearms, and engages in public interest litigation in defense of the Second Amendment to the U.S. Constitution, as well as human and civil rights secured by law, the rights of victims of crime, the right to own and use firearms, and related issues. GOF is exempt from federal income tax as an organization described in Section 501(c)(3) of the Internal Revenue Code, and is classified as a public charity.

GOF fulfills its educational/public interest litigation mission through a variety of projects, including the submission of briefs in federal and state legal actions presenting significant questions of law. GOF has filed *amicus curiae* briefs in other federal litigation involving constitutional or statutory issues, including briefs in this Court — District of Columbia v. Heller, 554 U.S. __, 171 L.Ed.2d 637 (2008), among others — as well as in United States district courts and United States courts of appeal. This brief is intended to assist the Court with respect to its analysis of whether the court below — the United States Court of Appeals for the Fourth Circuit — correctly interpreted 18 U.S.C. Section 921(a)(33)(A), requiring a remand for dismissal of the superseding indictment in the district court.

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[1] The parties have consented to the filing of this amicus brief. No counsel for a party authored this brief in whole or in part, and no person other than the *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

This brief, *inter alia*, analyzes the meaning of the term "misdemeanor crime of domestic violence" textually, as well as in its broad statutory context, arguments different from, although supportive of, those advanced by the respondent. GOF is particularly concerned that the misdemeanor crime of domestic violence prohibition on firearms possession, use, and ownership be properly construed so as to (1) protect lawful firearm ownership, (2) improve the accuracy and uniformity of the purchase disqualifying data on the National Instant Criminal Background Check System, and (3) reduce the risk of inadvertent self-incrimination in complying with the certification requirements imposed by ATF Form 4473 on purchases of firearms from federally-licensed firearms dealers.

SUMMARY OF ARGUMENT

This appeal concerns the application of the term, "misdemeanor crime of domestic violence" ("MCDV"), as defined in 18 U.S.C. Section 921(a)(33)(A), to the prosecution of a person for violation of 18 U.S.C. Sections 922(g)(9) and 924(a)(2). Section 921(a)(33)(A)'s definition of MCDV, however, has ramifications well beyond the instant case. Settling the requisite elements of MCDV in this case will determine whether a prior misdemeanor conviction will prevent a person from purchasing a firearm from a federal firearms license holder ("FFL"), because an MCDV conviction appears on the National Instant Background Check System ("NICS") as a disqualifying conviction under 18 U.S.C. Section 922(t). Further, the MCDV definition determined in this case could serve

as the predicate for the possible prosecution of a person for filing a false statement on ATF Form 4473, which requires every person who seeks to purchase a firearm from an FFL to certify that he has not been convicted in any court of a MCDV.

In its brief, petitioner ("the Government") has assumed that the MCDV definition affects only criminal prosecutions under 18 U.S.C. Sections 922(g)(9) and 924(a)(2). Indeed, the opinions of the courts of appeals upon which the Government has relied to support its MCDV definition have made the same assumption, having examined the language of Section 921(a)(33)(A) only in relation to Section 922(g)(9). Having made this mistaken assumption, both the Government and the courts of appeals have failed to apply this Court's standard rule that "[t]he plainness or ambiguity of statutory language is [i] determined by reference to the language itself, [ii] the specific context in which that language is used, and [iii] the broader context of the statute as a whole." Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997).

Apparently, the Government believes that the Robinson rule of construction does not even apply to this case, because the language of 18 U.S.C. Section 921(a)(33)(A) is so "clear," and the Fourth Circuit's interpretation is so "awkward and unnatural," that it is "*not necessary to go beyond the text of* [Section 921(a)(33)(A)] in answering the question presented." *See* Brief for the United States (hereinafter "U.S. Br."), pp. 8, 12-22. Upon closer look, however, it is the Government's interpretation that is "awkward and unnatural," not the Fourth Circuit's, as revealed by a

careful examination of both the specific and the broader context of the statute as a whole.

Specifically, the Government has put forth interpretations of Section 921(a)(33)(A) that deconstruct the statutory language and structure, substituting a revised version of the text, omitting some words and adding others to support an incomplete predicate offense.

More broadly, the Government has failed to set forth an MCDV definition that best serves the purpose of the enforcement of federal firearms law as a whole. Its proposed definition introduces uncertainty into the mens rea element governing the enforcement of the criminal prohibition set forth in Sections 922(g)(9) and 924(a)(2). It also undermines the uniformity and accuracy of the MCDV information on NICS. And it unnecessarily creates a trap for the unwary purchaser of a firearm who must certify on ATF Form 4473 that he has not been convicted of a MCDV.

While the Government has purported to have examined the language in light of the "scope" of the statute and its legislative history (U.S. Br., pp. 22-34), it has failed to address the text in light of its statutory context, having substituted its own, and a single senator's, policy views for the rule expressly adopted by the Congress.

ARGUMENT

I. The Government's Interpretation of the Language of 18 U.S.C. Section 921(a)(33)(A) Is Tendentious and Deconstructive.

A. The Government Has Erroneously Rewritten Section 921(a)(33)(A).

No matter how "awkward" or "even ungrammatical" the language of a statute may be, the "starting point in discerning congressional intent ... is the existing statutory text." *See* Lamie v. United States Trustee, 540 U.S. 526, 534 (2004). In pertinent part, 18 U.S.C. Section 921(a)(33)(A) states:

> [T]he term 'misdemeanor crime of domestic violence' means an offense that —
>
> (i) is a misdemeanor under Federal, State, or Tribal law; and
>
> (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

In violation of the Lamie rule, the Government puts this text aside, rewriting the statute so as to define a

misdemeanor crime of domestic violence as "an offense, committed by a person with a domestic relationship with the victim, that both is a misdemeanor and has, as an element, the use or attempted use of force, or the threatened use of a deadly weapon." *See* U.S. Br., pp. 8 and 13. The Government's revised version of the actual statutory text should be rejected by this Court.

Purporting to quote the text, the Government begins its analysis of the statutory language first by dropping the subsection designations. U.S. Br., pp. 7, 12. Second, the Government couples the "misdemeanor clause" that appears in the statutory subsection (i) and the "use of force" clause that appears in the statutory subsection (ii), and collapses the two clauses into one "restrictive relative clause" modifying the word "offense" as it appears in the preface of Section 921(a)(33)(A). U.S. Br., pp. 8, 13. By melding the two clauses, as if they are in one subsection, instead of the statutorily designated separate subsections, the Government has divorced the "domestic relation" clause from the "use of force" clause, even though the two clauses appear in the same statutory subsection (ii) in the actual text. By separating these two clauses, the Government simultaneously separates the "domestic relation" clause from the word "element" so that "element" appears to apply only to the "use of force" clause. Thus, by the Government's **textual manipulation** the statute would appear to provide that the "use of force" clause is a requisite element of a MCDV, and that the "domestic relation" provision is not. *See* U.S. Br., pp. 8, 13.

Just as dramatically, the Government has moved the word "that," which appears in the prefatory section of the statute — dropping the immediately following dash (—) — and merged it into subsection (i). Thus, it rewrites the statute, making "that" relate only to the misdemeanor and use of force clauses, and not to the requisite domestic relationship clause. *See* U.S. Br., pp. 7-8, 12-13. By this sleight of hand, the Government has freed itself to read "committed by a current or former spouse" as if it directly followed the prefatory word "offense." *See* U.S. Br., p. 21. Had the Government not excised "that —" from its paraphrase of the prefatory clause, it would have had to face the embarrassment of urging upon this Court an interpretation that would have caused the statute to read as follows: "the term misdemeanor crime of domestic violence means an offense that — committed by a current or former spouse."

As the Amicus Brief for the Professors of Linguistic Science points out, the Government's "reconfigured text would be an ungrammatical mess [that] could be fixed only by adding a word to the statute." Brief of Professors of Linguistics and Cognitive Science as Amici Curiae in Support of Neither Party ("Linguistics Br."), pp. 30, 32. Moreover, by reconfiguring the text by dropping "that —," the Government seeks to lead this Court to ignore the canon against "rewriting rules that Congress has affirmatively and specifically enacted." *See* Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978).

B. The ATF Has Erroneously Rewritten Section 921(a)(33)(A).

Although the Government has not expressly relied on the revised regulatory version of Section 921(a)(33)'s MCDV definition set forth in regulations of the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"), it has found solace in the fact that Congress has "never ... repudiated the ATF's interpretation of the statutory definition." U.S. Br., p. 33. Yet, ATF's interpretation is not the same as the one that the Government urges this Court to adopt. *Compare* 27 C.F.R. § 478.11 *with* U.S. Br., pp. 8, 13. Instead, in pertinent part, the ATF has its own revised version:

> Misdemeanor crime of domestic violence. (a) Is a Federal, State ... offense that:
>
> > (1) Is a misdemeanor under Federal or State law ...
> >
> > (2) Has, as an element, the use or attempted use of physical force ... or the threatened use of a deadly weapon; and
> >
> > (3) Was committed by a current or former spouse, parent, or guardian of the victim.... [27 C.F.R. § 478.11.]

Unlike the Government's interpretative approach, the ATF honors the statutory structure of Section 921(a)(33)(A), placing the "misdemeanor clause" in regulatory subsection (1) and the "use of force" clause

in subsection (2). Furthermore, the ATF version conforms to the language of Section 921(a)(33)(A), utilizing the present-tense verbs "is" and "has" to link each subsection to the prefatory term so as to faithfully render the statutory definition that a MCDV "**is** a misdemeanor under federal or state law and **has,** as an element, the use ... of physical force." (Emphasis added.)

With respect to the "domestic relation" clause, however, the ATF's definition, like the one proposed by the Government, deviates from both the statutory language and structure. Instead of having placed the "domestic relation" language in the regulatory subsection (2), so as to correlate that subsection with subsection (ii) in the statute, ATF has placed the "domestic relation" clause in a separate subsection (3). To make this structural alteration work, ATF has **added** a semicolon and the word "and" at the end of the "use of force" clause subsection (2), neither of which appears in the statute. More significantly, ATF has chosen to begin subsection (3) with the word "was" so as to link that subsection to the prefatory language in such a way that it summarily reads, as follows: "Misdemeanor crime of domestic violence ... is a Federal, State or local offense that ... **was** committed by a current or former spouse, etc." (Emphasis added.)

Not only does the addition of these words to the statutory definition violate the canon of construction against "read[ing] an absent word into the statute" (*see* Lamie v. United States Trustee, 540 U.S. at 538), as well as the rule of the last antecedent (*see* Resp. Br., pp. 19-24); ATF has chosen a past tense form of the

verb for its subsection (3), rather than a present tense form as appears in subsections (1) and (2). The past tense reinforces ATF's policy preference that, in order to establish the existence of a predicate misdemeanor crime undergirding Section 922(g)(9), it is enough to do so **after** a conviction of a misdemeanor wherein the "use of force" element has been proved. Thus, under ATF's revision, law enforcement authorities could determine — long after a conviction — whether a misdemeanor offense had been committed against a victim who was in one of the specified domestic relationships with the misdemeanant by reference to information or finding outside of the court proceeding. By choosing the past tense, rather than the statutorily prescribed present tense, ATF has superimposed its view that the domestic relationship need not be proved as part of the predicate misdemeanor crime of domestic violence, but can be discovered and proved later. *See* 63 Fed. Reg. 35,520 (ATF Temporary Rule, June 30, 1998). *See also* Brief *Amicus Curiae* of Brady Center to Prevent Gun Violence, *et al.*, p. 29 n.76.

Of course, whether the ATF revisions are in the present or past tense, the ATF regulation contains language that Congress did not put in the statute. Clearly, there is no grammatical need to add to the statutory language in order to make sense out of text as it is written. *See* Linguistics Br., pp. 6-11. Moreover, by its additions, the ATF would urge upon this Court "an enlargement of [MCDV] by the court, so that what was omitted, presumably by inadvertence, may be included within its scope." *See* Iselin v. United States, 270 U.S. 245, 251 (1926). This Court, however, has refused to "read an absent word into the statute

[in] 'deference to the supremacy of the Legislature, as well as [in] recognition that Congressmen typically vote on the language of a bill'" (*see* Lamie, 540 U.S. at 538), not language added later.

C. The Government Has Erroneously Created an Incomplete Predicate Offense.

In support of its argument that the "use of force" clause is an element of the offense, whereas the "domestic relation" clause is not, the Government contends that "Congress would not ordinarily use the word 'element' in the singular to describe two **unrelated** 'elements' of an offense." U.S. Br., p. 8 (emphasis added). *See also id.*, pp. 13-14. But the Government offers no support for its argument that the two are "unrelated." Contrary to that argument, it is clear that both concepts — force/deadly weapon and a domestic relationship — are critical to the definition of a MCDV. Nevertheless, the Government emphasizes that "[h]ad Congress intended to require *additional* elements, separate and apart from the use of force, it presumably would have used the word 'elements,' in the plural." *Id.*, pp. 13-14 (italics original). To the contrary, as respondent has demonstrated, Congress often uses the singular element to embrace both the mode of aggression and its object — here the use of force or deadly weapon, and a person in one of the described domestic relationships. *See* Resp. Br., pp. 24-27.

But, the Government has subliminally substituted "any person" for the more restrictive class of persons set forth in Section 921(a)(33)(A) in order to complete

the predicate misdemeanor offense. It has perpetrated this legerdemain by a distraction, claiming that "the conceptual distinction between the mode of aggression (*e.g.*, the use of physical force) and the relationship between aggressor and victim (*e.g.*, current or former spouse)" would not have been "subsumed [by Congress] in a single 'element' requirement." *See* U.S. Br., p. 14. But why not? After all, Congress set out to define a misdemeanor crime of **domestic** violence, not just a misdemeanor crime of violence that could have been committed against another person generally, or even against another person's pet dog or cat, rather than another human being. Whatever the "conceptual distinction" the Government has in mind, it surely does not dictate that the crime defined is limited to a single element without regard to the identification of the "target" class of victims to be protected by the statute. *See* Linguistics Br., pp. 12- 25.

II. The Government's Interpretation of Section 921(a)(33)(A) Disregards the Statutory Context as a Whole.

The purpose of 18 U.S.C. Section 921(a)(33)(A) is twofold. First, it provides the definition of the predicate misdemeanor offense upon which a prosecution for violation of 18 U.S.C. Section 922(g)(9) may be based. Second, by providing the definition of the predicate offense defined by Section 922(g)(9), it controls the decision whether "receipt of a firearm by [a particular buyer] would violate" 18 U.S.C. Section 922(g)(9) and, therefore, preclude an FFL holder from transferring a firearm to such buyer, as provided in 18

U.S.C. Section 922(t)(4). This Court's standard rule is that "[t]he plainness or ambiguity of statutory language is [i] determined by reference to the language itself, [ii] the specific context in which that language is used, and [iii] the broader context of the statute as a whole." Robinson v. Shell Oil Co., 519 U.S. 337 (1997). On close examination, the Government's statutory interpretation does not serve both purposes of the statute, but the interpretation of the court of appeals below does.

A. The Government Has Failed to Address How Its Interpretation Serves the Mens Rea Requirement of 18 U.S.C. Section 924(a)(2) in a Prosecution for Violation of Section 922(g)(9).

The Government brief is premised entirely upon the assumption that one need only examine the language of Section 921(a)(33), as it relates to the actus reus element of 18 U.S.C. Section 922(g)(9), without regard to the mens rea element of Section 924(a)(2). *See* U.S. Br., pp. 7, 10-11, 34-37. Thus, the Government contends that omitting the "domestic relationship" as an element of the predicate offense is neither "impractical nor unfair," because in a prosecution for a violation of 18 U.S.C. Section 922(g)(9), the Government must prove beyond a reasonable doubt that the misdemeanor of which a person had previously been convicted must have been committed against a person who is in one of the domestic relationships specified in 18 U.S.C. Section 921(a)(33). U.S. Br., pp. 36-37.

The Government's position is not new. The several courts of appeals which have ruled that the domestic relationship is not an element of the predicate misdemeanor offense have come to the same conclusion. *See, e.g.*, United States v. Barnes, 295 F.3d 1354, 1359 (D.C. Cir. 2002); United States v. Hartsook, 347 F.3d 1, 4 (1st Cir. 2003); United States v. Kavoukian, 315 F.3d 139, 142, 145 (2d Cir. 2002); United States v. Shelton, 325 F.3d 553, 557, 562 (5th Cir. 2003). Indeed, three of the courts have expressly concurred with the Government's contention that there is no denial of fundamental fairness because the requisite domestic relationship of the predicate misdemeanor would have to be proved beyond a reasonable doubt in a Section 922(g)(9) prosecution. *See* Barnes, 295 F.3d at 1366-67; United States v. Meade, 175 F.3d 215, 221, n.1 and 222 (1st Cir. 1999); Kavoukian, 315 F.3d at 145.

Overlooked by these courts and by the Government, however, is the increased risk of the criminalization of the possession of a firearm under circumstances that most people would think would be perfectly legal. As this Court stated in Staples v. United States, 511 U.S. 600 (1994), "guns can be owned [in America] in perfect innocence." *Id.*, 511 U.S. at 611. In recognition of this fact, 18 U.S.C. Section 924(a)(2) imposes a "knowing" requirement upon any prosecution for violation of 18 U.S.C. Section 922(g)(9). Applying that mens rea standard to such a prosecution, the Government must prove beyond a reasonable doubt not only the existence of a domestic relationship described in 18 U.S.C. Section 921(a)(33)(A), but that the defendant **knew** that the relationship fell within the parameters of the

domestic relationships therein described. As the Staples Court has put it, "the usual presumption that a defendant must know the **facts** that make his conduct illegal should apply." Staples, 511 U.S. at 619 (emphasis added). This presumption is especially applicable to a prosecution for violation of Section 922(g)(9) which is punishable as a felony, subject to a prison term of up to 10 years.[2] *Id.*, 511 U.S. at 618.

Applying the Staples rule, it would not be enough for the prosecution in a Section 922(g)(9) case to prove that a requisite domestic relationship existed — as the Government and the courts of appeals have assumed. Rather, the prosecution would also be required to prove that the defendant knew that he was in a domestic relationship with his victim. If that fact had been established previous to the Section 922(g)(9) prosecution — in the predicate misdemeanor proceeding — then a defendant would have had ample opportunity to be apprised of the facts that would make his possession of a firearm illegal. But, if the domestic relationship were not an element of the underlying predicate misdemeanor, the misdemeanant could assume — and rightly so in light of the "long tradition of widespread lawful gun ownership by private individuals in this country" — that it was perfectly legal for him to continue to receive, possess and own a firearm. *See* Staples, 511 U.S. at 610, 611.

In light of America's established culture of lawful gun ownership and possession, requiring proof of the

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[2] 18 U.S.C. Section 924(a)(2).

requisite domestic relationship to establish the underlying predicate misdemeanor would better serve the mens rea requirement of Section 924(a)(2), as applied to a Section 922(g)(9) prosecution.

B. The Government Has Mistakenly Relied Upon Senator Frank Lautenberg's Description of How the NICS Actually Works.

Section 921(a)(33)'s definition of misdemeanor crime of domestic violence is not confined to its application to a federal prosecution for violation of 18 U.S.C. Section 922(g)(9), but extends to the administration of the National Instant Criminal Background System governing the transfers of firearms by FFL's. Neither the Government nor the courts have paused to examine how the exclusion of the domestic relation provision as an element of the MCDV would impact that system. Had they done so, they would have found that inclusion of the domestic relationship as an element of a MCDV is necessary to ensure fairness and accuracy in the NICS criminal background check system.

Without hesitation, the Government has assumed that the current NICS operates in the way described by Senator Lautenberg in his Senate remarks in support of the misdemeanor crime of domestic law statute. *See* U.S. Br., pp. 31-32.[3] Thus, the

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[3] Those courts of appeals that have addressed this matter make the same assumption. *See* Barnes, 295 F.3d at 1365; Meade, 175 F.3d at 219; Kavoukian, 315 F.3d at 144; Shelton, 325 F.3d at 562;

Government writes approvingly: "[i]n discussing the implementation of the new law, Senator Lautenberg noted that the Brady Handgun Violence Prevention Act, 18 U.S.C. 922(s)-(t), **requires** law enforcement officials to make a 'reasonable effort' to ensure that persons seeking to purchase **handguns** are not prohibited from doing so under federal law. See 18 U.S.C. 922(s)(2)." U.S. Br., p. 31 (emphasis added).

While Senator Lautenberg accurately described the Brady Act interim background check extant in 1996, the Government is mistaken to have relied upon that description as a representation of the way that the NICS works today. At the time of the passage of the MCDV transfer prohibition, the Brady Act interim background check governed only FFL transfers of "**handguns**," not all **firearms**, as now. And, in order to implement that **temporary system**, Congress mandated state and local law enforcement officials to make a "reasonable effort" to determine "whether [a particular] receipt or possession [of a handgun] would be in violation of the law, including research in whatever State and local record keeping systems are available and in a national system designated by the Attorney General." *See* 18 U.S.C. Section 922(s)(2). Not only was this mandate ruled to be unconstitutional in Printz v. United States, 521 U.S. 898 (1997), but Section 922(s)(2) expired when the NICS became operational on November 30, 1998.

White v. Dept. of Justice, 328 F.3d 1361, 1366 (Fed. Cir. 2003).

Under NICS there is no comparable mandate requiring States to submit information on prohibited persons to the NICS, much less to keep accurate and complete records. *See* Testimony of Rachel L. Brand, Assistant Attorney General for Legal Policy, U.S. Department of Justice, before the Committee on Oversight and Government Reform Subcommittee on Domestic Policy, U.S. House of Representatives, 110th Cong., p. 5 (May 10, 2007) (hereinafter "Brand Testimony"). Indeed, until the enactment of the NICS Improvement Amendments Act of 2007 (Pub. L. 110-180, Jan. 8, 2008), the only incentive that States had to provide up-to-date information to the NICS was "to gain the mutual benefit of having ready access to criminal history and other information relevant to law enforcement activities on an individual arising in other States." *Id.* Even with the enactment of the 2007 amendments, state and local officials are only offered a federal carrot, "a waiver of the 10 percent matching requirement for National Criminal History Improvement Grants under the Crime Identification Technology Act of 1998." *See* Pub. L. 110-180, Section 102.

In short, Senator Lautenberg's 1996 comments have nothing to do with the way the NICS works, and it is simply incorrect for the Government to urge this Court to rely upon them. *See* U.S. Br., p. 31.

C. Sections 922(t)(4) and 922(g)(9) Are Best Served by the Interpretation that the Requisite Domestic Relation Is an Element of the Predicate Misdemeanor.

According to 18 U.S.C. Section 922(t)(1), an FFL — before transferring possession of a firearm to "any other person who is not" an FFL — must "contact" the NICS. "[I]f the [NICS] notifies the [contacting] licensee that the **information available** to the system does **not** demonstrate that the receipt of a firearm by such other person would violate" Section 922(g), then the licensee may transfer the firearm. *See* 18 U.S.C. Section 922(t)(4) (emphasis added). While the NICS is designed to keep firearms out of the hands of the nine categories of dangerous people set forth in Section 922(g), the effectiveness of the system depends largely on the "voluntary" decision of State and local government officials to provide the pertinent information. Furthermore, reporting officials are protected from any liability either for any failure to report or for any mistaken report of pertinent disqualifying information. *See* 18 U.S.C. Section 922(t)(6). Although the recently-enacted NICS Improvement Amendments Act of 2007 has added a financial incentive to state and local government reporting agencies (Pub. L. 110-180, Section 102), the accuracy and completeness of the information received by NICS is still largely dependent upon the discretion of State and local officials. As a matter of constitutional law, of course, Congress cannot conscript nonfederal officials to report the information needed to make the NICS work. *See* D. Kopel, "The Brady Bill Comes Due," 9 *Civil Rights J.* 189 (1999).

Because NICS depends largely upon the cooperation and self-interest of State and local governments, "[t]he effectiveness of the NICS in preventing gun transfers to prohibited persons depends directly on the availability to the system of automated information about which individuals are prohibited from receiving a firearm." Brand Testimony, p. 4. Among the five most serious problem areas identified by Assistant Attorney General Brand — in her 2007 congressional testimony — were MCDV convictions. And the primary reason given for this deficiency was the fact that "[t]he records of most misdemeanor assault convictions do **not** identify whether the victim had a **domestic relationship** with the offender that makes the offense one that prohibits the offender from receiving or possessing a firearm." Brand Testimony, p. 8 (emphasis added).

So long as the requisite domestic relationship is not an element of a MCDV, the underreporting problem will persist. Moreover, in the absence of a clear judicial finding of the existence of a requisite domestic relationship, reporting inaccuracies will continue. Unsurprisingly, an official U.S. Department of Justice guide designed to assist government officials to identify MCDV's states that "[i]t is ... beneficial, whenever possible, to have the *relationship between the defendant and victim* documented in the charging papers and the court's record of conviction...." *See* U.S. Department of Justice, Information Needed to Enforce Firearm Prohibition, Misdemeanor Crimes of Domestic Violence ("MCDV Information Guide") (Nov. 2007) (italics original). Nevertheless, the Guide concedes

that the requisite domestic relationship is "typically made by reference to the police report...." *Id.*

Police reports, as well as other such untested information sources, are often unreliable, based upon self-serving statements made under emotionally-charged circumstances, and not subject to the rigors of cross-examination in a courtroom. Furthermore, the existence of a requisite domestic relationship is not self-evident. While Section 921(a)(33)(A) identifies the familiar and formal husband/wife relationship, it also includes the less formal and less obvious relationships of parent/child, guardian/child, "a person with whom the victim shares a child in common; a person who is cohabiting with or who has cohabited with the victim as a spouse, parent or guardian; or a person ... similarly situated to a spouse, parent, or guardian...." Significantly, the Department of Justice MCDV Information Guide contains only one specific instruction on the meaning of these terms, and that instruction is in the negative: "Simply indicating that the persons are boyfriend/girlfriend does not establish the relationship necessary for the MCDV prohibitor to apply."

Construing Section 921(a)(33)(A) to require proof of the requisite domestic relationship as an element of a MCDV offense would resolve these reporting uncertainties, thereby improving the completeness and accuracy of the MCDV information on NICS. No longer would MCDV reports to NICS be based upon police notes and administrative inserts into court records. Rather, such reports would relate judicial findings in an adversary proceeding based upon

articulated legal criteria and, where available, documentary evidence, such as marriage licenses, birth certificates, adoption papers, and guardianship papers. Furthermore, in today's laissez-faire sexual environment, proof of the requisite domestic relationship as an element of the offense would be based upon legal criteria that are necessary to assess whether two persons are "cohabiting" or living in a way that is "similarly situated" to a marriage relationship, thereby bringing a more uniform application to the MCDV prohibition in the more informal domestic relationships.

D. ATF's Administration of Sections 922(t)(4) and 922(g)(9) Is Best Served by the Interpretation that the Requisite Domestic Relation Is an Element of the Predicate Misdemeanor.

Prior to the purchase of a firearm from an FFL, the prospective buyer must complete Section A of ATF Form 4473 — Firearms Transaction Record Part I - Over-the-Counter. Among the questions asked is whether the prospective buyer has "been convicted in any court of a misdemeanor crime of domestic violence." *See* ATF Form 4473, Question 12.i (http://www.atf.gov/forms/4473/). To assist the prospective buyer in answering the question, yes or no, the form directs the buyer to "Important Notice 6, Exception 1, and Definition 4."

Important Notice 6 warns, *inter alia*, that 18 U.S.C. Section 922(g) "prohibits ... receipt, or possession ... of

a firearm by one who: has been convicted of a misdemeanor crime of domestic violence...."

Exception 1 advises, *inter alia*, that a person "who had been convicted of a misdemeanor crime of domestic violence is not prohibited from purchasing, receiving, or possessing a firearm" and should answer "no" to Question 12.i if: "(1) under the law [of the jurisdiction] where the conviction occurred, the person has been pardoned, the conviction has been expunged or set aside, or the person has had civil rights ... restored AND (2) the person is not prohibited by the law [of the jurisdiction] where the conviction occurred from receiving or possessing firearms." Exception 1 further advises that a prospective buyer, even though convicted of a MCDV, should answer Question 12.i in the negative unless: "(1) the person was represented by a lawyer or gave up the right to a lawyer; and (2) if the person was entitled to a jury, was tried by a jury or gave up the right to a jury trial."

Quoting almost *verbatim* the language of 18 U.S.C. Section 921(a)(33), Definition 4 informs the prospective buyer that a MCDV is:

> A Federal, State, or local offense that is a misdemeanor under Federal or State and has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with, or has cohabited with the victim as a spouse, parent, or guardian, or by a

> person similarly situated to a spouse, parent, or guardian of the victim.

In explanation of this statutory language, Definition 4 concludes:

> The term includes all misdemeanors that have as an element the use or attempted use of physical force or the threatened use of a deadly weapon *(e.g., assault and battery)*, if the offense is committed by one of the defined parties. [Italics original.]

According to the Government's proposed interpretation of 18 U.S.C. Section 921(a)(33), whether the misdemeanor was "committed by one of the defined parties" need not be established as part of the record of the misdemeanor conviction, but may be ascertained outside the judicial process and subsequent to it. However, if the requisite domestic relationship is not an established fact at the time that a person is convicted of an assault and as part of the judicial record, how is a prospective buyer to answer Question 12.i? According to Definition 4, whether a person has committed a MCDV depends upon whether it "is committed by one of the defined parties." Only if the "defined party" relationship is an element of the predicate misdemeanor offense, and thus established as a fact on the judicial record, would the prospective buyer, in many instances, really know whether to answer the question yes or no. For example, who would be competent to determine if an individual were "similarly situated to a spouse, parent, or guardian of the victim"? *See* ATF Form 4473, Definition 4. Indeed,

one could argue that the question could be answered in the negative so long as the person has not been convicted of violation of 18 U.S.C. Section 922(g)(9) because only then has it been established that the predicate misdemeanor was committed by "one of the defined parties."

But this question should not be left open to interpretation. After all, ATF Form 4473 requires the prosepective buyer to "certify that the answer[] to [Question 12.i is] true and correct" and warns the buyer that "making any false oral or written statement ... with respect to this transaction, is a crime punishable as a felony." *See* 18 U.S.C. Section 1001. Unless the requisite domestic relationship is an element of the MCDV as defined in 18 U.S.C. Section 921(a)(33), ATF Form 4473 could set a trap for the unwary, rather than further its purpose of keeping firearms out of the hands of ineligible persons.

III. Both the Floor Statements and Current Memories of Senator Lautenberg Are Unreliable and Irrelevant in Understanding the Meaning of 18 U.S.C. Section 921(a)(33).

The Government brief places principal reliance on the views expressed by the provision's sponsor, Senator Frank Lautenberg, on the Senate floor to document the legislative history of 18 U.S.C. Section 921(a)(33). U.S. Br. pp. 27-32 (citing the Senator 10 times in its five-page analysis of legislative history, and using quotations from his Senate floor statement). Unsurprisingly, the Lautenberg brief also views

Senator Lautenberg's views to be of preeminent importance. Lautenberg Br., pp. 3-27. However, there are many reasons to give Senator Lautenberg's personal views no more weight than the views of any one senator out of 100, or even any one federal legislator out of 535. Respondent's brief details the omissions and weaknesses in the Lautenberg brief (Respondent's Brief, pp. 28-40), leaving only a few remaining observations to be made.

The Lautenberg brief does not seek to hide the visceral anti-gun views of the Senator. Its introduction cites favorably an article that "'[p]eople who keep guns in their homes appear to be at greater risk of homicide...'" (Lautenberg Br., p. 2) and then asserts that offenders who were permitted to plead down felonies to misdemeanors had been "free to possess firearms and to terrorize and murder their loved ones" as if that is what persons who own firearms normally do (*id.*, p. 4). Senator Lautenberg's oft-quoted floor statement distinguishes between "major civil rights, such as the right to vote, to hold public office, and to serve on a jury" from presumably what he viewed as a minor right or no right at all, such as owning a firearm.[4] 142 Cong. Rec. S11877 (Sept. 30, 1996). The

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[4] Justice Scalia evidenced a much more respectful view of the United States Constitution when he stated that it "surely elevates above all other interests the right of law-abiding responsible citizens to use arms in defense of hearth and home." District of Columbia v. Heller, 554 U.S. __, 171 L.Ed.2d 637, 683 (2008). Indeed, the "right to keep and bear arms" is preserved because the framers viewed it as "being necessary to the security of a free State." *Id.* It ... a right shared by members of the American polity, and is certainly no less important than voting, holding

right to own a firearm may be disparaged by Senator Lautenberg, but it is a right enshrined in this nation's Constitution and dozens of state constitutions. In sum, Senator Lautenberg comes to this Court as a political actor, whose views are entitled to no special weight. Indeed there are specific signs that his political agenda may have clouded his memory of the events of September 29-30, 1996.

The Lautenberg brief asserts that "Senator Lautenberg introduced the legislation at issue in this case." Lautenberg Br., p. 3. His brief is offered "on behalf of the sponsor of the legislation" and "attempts to provide this Court with a complete account of the legislative history of the Lautenberg Amendment." *Id.*, p. 6. It fails to fulfil this mission.

The Lautenberg brief reveals that "the 'as an element' language at the crux of this interpretive dispute had never been part of Lautenberg's legislation ... until the eve of the Amendment's enactment." *Id.*, p. 13. Therefore, while Senator Lautenberg may have fathered the movement underlying 18 U.S.C. Section 921(a)(33), the language at issue here was not his own. Rather, that language was inserted "hours before [the amendment's] enactment..." *Id.*, p. 13. The

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public office, and serving on a jury. Indeed, it can be argued that none of the rights considered "major" by Senator Lautenberg have as much constitutional protection as the "right to keep and bear arms." *See* discussion of the Second Amendment as resting upon the principle that the People embody the nation's sovereignty in Amicus Brief of Gun Owners of America, Inc., Gun Owners Foundation, *et al.* filed in Heller, pp. 10-18.

Lautenberg brief never states that Senator Lautenberg wrote this language, but that he "agreed, on the night before the bill's final passage, to a number of changes in order to address its opponents concerns." *Id.*, p. 17. As the entire amendment was quite short, and the "crux of this interpretive dispute" was not his, it is difficult to understand why Senator Lautenberg's views would be given exalted status.

From his own words, one might conclude that Senator Lautenberg delivered his floor statement more for reading by judges, than listening by Senators: "I do want to make very clear, however, that this language should not be **interpreted** ..." in a certain way. "I wanted to state this definitively **for the record**." He described statutory language "as it should be **interpreted** in the future." 142 Cong. Rec. S11877 (emphasis added). His representation to this Court, that the language of the Lautenberg amendment "is unambiguous" (Lautenberg Br., p. 7), appears to be at odds with his earlier efforts to clarify how it should be interpreted.

More likely, Senator Lautenberg had political reasons to deliver his floor statement. He heaps praise on the gun control posse that helped him, including "Sarah Brady and Handgun Control for raising this issue at the Democratic convention," and a broad mix of anti-gun and other groups, which he describes as "[o]ver 30 national organizations." 142 Cong. Rec. S11877. Those persons who helped him get his bill through were probably not present the previous night, when Senator Lautenberg said he accepted the language required by opponents of his provision to see

it passed. It can be assumed that at least some of the ideologues he identifies as his supporters would have been very upset with him for his compromise, accepting weakening language to his provision. It may be that his claims that "we agreed to include in the final agreement a provision that has no real substantive effect, but that may help to assure some people" was no more than cover for his compromise. *See* 142 Cong. Rec. S11877. Beyond characterizing his compromise as having "no real substantive effect," he even asserted that he "did agree to a new definition of covered crimes that is more precise, and probably broader." 142 Cong. Rec. S11877. In implicitly asserting his consummate skill as a negotiator, and the ineptitude of his Senate opposition, Senator Lautenberg may have protested too much to retain credibility to now explain the real effect of the compromise language.

Lastly, the Lautenberg brief illustrates the problems associated with asking any person, even a veteran political warhorse, to recall the details of events that occurred over a 24-hour span, a dozen years ago. On the last page of his brief, Senator Lautenberg's view of his amendment is summarized for this Court as follows:

> Senator Lautenberg was clear that the Amendment applied to all offenders convicted of violent crimes, whether misdemeanor or **felony**, committed against **loved ones**. [Lautenberg Br., p. 27 (emphasis added).]

Senator Lautenberg's representation to this Court that he thought his "Amendment applied to all offenders convicted of ... felon[ies]" throws into question the accuracy of the rest of his memories about the events of September 1996. Further, to summarize the class of relationships set out in the statute, Senator Lautenberg's employs the phrase — "loved ones" — a term that has more the ring of a political slogan than a statement of technical legal precision. These are not the type of clear and accurate memories that this Court can even consider relying on to understand the meaning of 18 U.S.C. Section 921(a)(33).[5]

For the reasons set out above, Senator Lautenberg's floor statement, and the derivative arguments contained in Government brief and Lautenberg brief based heavily thereon should be given no weight.

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[5] "Everyone who has written knows that his opinion of his own work changes, and that his responses to his own text vary from reading to reading." E.D. Hirsch, Jr., Validity in Interpretation, p. 7 (Yale Univ. Press 1967).

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Fourth Circuit should be affirmed.

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Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

RANDY EDWARD HAYES,

Respondent.

On Writ of Certiorari To The

United States Court of Appeals for the Fourth Circuit

BRIEF *AMICI CURIAE* OF UNITED STATES SENATORS FRANK R. LAUTENBERG, DIANNE FEINSTEIN, AND PATTY MURRAY IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE

The question presented in this case is whether a misdemeanor crime of domestic violence must have been prosecuted under a statute that has a domestic relationship as an element in order for the crime to be a predicate offense that prohibits the misdemeanant from possessing a gun under 18 U.S.C. § 922(g)(9) (2000 & Supp. V). *Amicus curiae* United States Senator Frank R. Lautenberg, representing the State of New Jersey, authored and sponsored the legislation before this Court. Senator Lautenberg has a strong interest in ensuring that courts and federal law enforcement officials construe the legislation to give effect to Congress's intent in enacting it.

United States Senators Dianne Feinstein and Patty Murray, representing the States of California and Washington, respectively, both voted for and spoke strongly in support of the legislation before this Court. Senators Feinstein and Murray also have a strong interest in ensuring that courts and federal law enforcement officials construe the legislation to give effect to Congress's intent in enacting it.[1]

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, or their counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and their consents are being lodged herewith.

INTRODUCTION

When Congress enacted the legislation extending prohibition against gun possession to domestic violence misdemeanants, it did so with a broad purpose: to address the widespread problem of gun-related domestic violence by taking guns out of the hands of *all* individuals with a history of domestic abuse.

The statistics—both at the time of the Amendment's enactment and more recently—are staggering. Studies have shown that, on average, more than three women in the United States are murdered by their husbands or boyfriends every day. U.S. Dep't of Justice, *Bureau of Justice Statistics Crime Data Brief, Intimate Partner Violence, 1976-2001* (Feb. 2003) (cited on Family Violence Prevention Fund website, at http://www.endabuse.org/resources/facts/). Access to firearms increases the risk of intimate partner homicide more than five times more than instances where there are no weapons. D.J.C. Campbell et al., *Risk Factors For Femicide in Abusive Relationships: Results from a Multi-Site Case Control Study*, Am. J. Public Health, 93(7) at 1092 (July 2003); *see also* Arthur R. Kellerman et al., *Gun Ownership as a Risk Factor for Homicide in the Home*, 329 New Eng. J. Med. 1084-91 (Oct. 7, 1993) (concluding that "[p]eople who keep guns in their homes appear to be at greater risk of homicide in the home than people who do not[,]... due to a substantially greater risk of homicide at the hands of a family member or intimate acquaintance"). In fact, more than three times as many women are murdered by guns used by their husbands or intimate acquaintances than are killed by strangers' guns, knives or other weapons combined. Violence Policy Center, *When Men Murder Women: An Analysis of 2002 Homicide Data: Females Murdered by Males in Single Victim/Single Offender Incidents* (2004); *see also* James A. Mercy et al., *Fatal Violence among Spouses in the United States, 1976-85*, J. Am. Med. Ass'n, 79(5) at 598

(May 1989) (finding that firearms more likely to be used in spouse homicides than in nonspouse homicides).

With statistics like these in mind, Senator Lautenberg introduced the legislation at issue in this case. *See* 142 Cong. Rec. 5,840 (1996) (introducing amendment and citing statistic that "in households with a history of battering, a gun in the home increases the likelihood that a woman will be murdered fivefold"). That legislation amended Section 922(g), Title 18, United States Code, to add subsection (9), prohibiting anyone convicted of a "misdemeanor crime of domestic violence" from owning or possessing a gun. 18 U.S.C. § 922(g)(9). The legislation defined a "misdemeanor crime of domestic violence" as one that "(i) is a misdemeanor under Federal or State law;" that "(ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon," and that is committed by someone who is in a specified domestic relationship with the victim. 18 U.S.C. § 921(a)(33)(A) (2000 & Supp. V) (hereinafter, "the Lautenberg Amendment" or "Amendment").[2]

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[2] The entire text of §921(a)(33)(A) is as follows:

Except as otherwise provided in subparagraph (C), the term "misdemeanor crime of domestic violence" means an offense that—

(i) is a misdemeanor under Federal or State law; and

(ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim[.]

(Continued ...)

Prior to the Lautenberg Amendment, only those convicted of felonies could be prohibited from firearm ownership and possession under §922(g). Because of the barriers to prosecuting and convicting domestic violence offenders—including many states' view of domestic violence as a family matter, rather than a crime against the state—many offenders were permitted to plead down from felonies to misdemeanors, and thus remained free to possess firearms and to terrorize and murder their loved ones. Senator Lautenberg's legislation—and Congress's enactment of it—was aimed at closing this loophole in federal gun ownership restrictions, and keeping guns out of the hands of anyone who "attempts or threatens violence against a loved one." *See* 142 Cong. Rec. 10,377 (1996); 142 Cong. Rec. 26,675 (1996).

For almost eleven years, the federal Courts of Appeals that considered the Amendment adhered to this clear intent of the Senator and his colleagues in Congress, unanimously holding that for a domestic violence misdemeanant to be subject to §922(g)(9)'s gun ban, the statute under which he was previously convicted need have as an element only the "use or attempted use of physical force, or the threatened use of a deadly weapon[.]" 18 U.S.C. § 922(g)(9).[1] *See United States* v. *Heckenliable*, 446 F.3d 1048, 1049 (10th Cir. 2006); *United States* v. *Belless*, 338 F.3d 1063, 1067 (9th Cir. 2003); *White* v. *Dept. of Justice*, 328 F.3d 1361, 1364-67 (Fed. Cir. 2003); *United States* v. *Shelton*, 325 F.3d 553, 562 (5th Cir. 2003); *United States* v. *Barnes*, 295 F.3d 1354 (D.C. Cir. 2002); *United States* v. *Kavoukian*, 315 F.3d 139, 142-44 (2d Cir. 2002); *United States* v. *Chavez*, 204 F.3d 1305, 1313-14 (11th Cir. 2000); *United States* v. *Meade*, 175 F.3d 215, 218-21 (1st Cir. 1999); *United States* v. *Smith*, 171

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[1] 18 U.S.C. § 921(a)(33)(A).

F.3d 617, 620 (1999). Recently, however, a divided panel of the Fourth Circuit—the first and only court to do so—required that the predicate misdemeanor statute also explicitly contain an additional element: that the offense be committed by an individual in a domestic relationship with the victim. *See United States* v. *Hayes*, 482 F.3d 749, 752 (4th Cir. 2007).

Amicus agrees with the Petitioner that the Fourth Circuit's reading of the Lautenberg Amendment is patently erroneous. *Amicus* submits that, for the reasons set forth in Petitioner's brief,[3] the plain language of the statute supports Petitioner's argument, and flatly undermines the Fourth Circuit's construction of the statute. Pet. Br. at 12-22.

However, to the extent there is any legitimate debate over the meaning of the plain language of the statute, the legislative history of the Amendment should end all such debate. As argued herein, the Amendment's legislative history demonstrates that Congress intended that the Lautenberg Amendment apply to all domestic violence misdemeanants regardless of whether the predicate misdemeanor statute contains the domestic relationship as an element. Contrary to the Fourth Circuit's conclusion, Congress never intended to limit §922(g)(9)'s predicate offenses to only those laws that have as explicit elements both the use or attempted use of violence *and* the presence of a domestic relationship.

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[3] *Amicus* also submits that reversal is warranted for all of the other reasons set forth in Petitioner's Brief, as well as those set forth in the briefs of other *amici* in support of Petitioner.

SUMMARY OF ARGUMENT

This brief, on behalf of the sponsor of the legislation and two of its strongest supporters in the Senate, attempts to provide this Court with a complete account of the legislative history of the Lautenberg Amendment. While even the cursory glance at the legislative history given by the Fourth Circuit belies the court's own interpretation of the Amendment, a truly thorough examination of this history lays bare this interpretation as wholly at odds with Congressional intent.

First, this brief argues that it is appropriate for the Court to examine the legislative history of the Amendment because legislative history is a vital tool for determining Congress's intent in enacting the law. *Second*, the brief examines in depth the legislative history of the Amendment, including Congress's prior efforts to enact similar legislation. This examination reveals that Congress intended the Amendment's prohibition to apply broadly to all domestic misdemeanants, in order to close the loophole created by prosecution of many domestic violence offenses as misdemeanors. Moreover, the legislative record reflects that the "as an element" language at the core of the Fourth Circuit's holding was meant to narrow the potential scope of *conduct* subject to the prohibition, not the scope of *misdemeanor statutes*, and was never intended to undermine the broad application to all domestic violence convictions that Congress had in mind for the Amendment. *Third*, Congress's presumed awareness of state and federal law when it enacted the Amendment also demonstrates that it intended the Amendment to apply to all domestic violence misdemeanants. *Fourth*, Congressional silence in the face of unanimous judicial and administrative interpretation of the Amendment strongly suggests that such interpretation is in line with Congressional intent, and further undermines the Fourth Circuit's holding below. In sum, a truly "thorough

examination of the entire history of the legislation," *Hayes*, 482 F.3d at 756, reveals no support for the Fourth Circuit's interpretation and significant support for the contrary interpretation adopted by every other Court of Appeals to consider this question.

ARGUMENT

I. THE LEGISLATIVE HISTORY OF THE LAUTENBERG AMENDMENT IS AN APPROPRIATE TOOL IN CONSTRUING CONGRESSIONAL INTENT.

"As in all cases of statutory construction, [the Court's] task is to interpret the words of [the statute] in light of the purposes Congress sought to serve." *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979). It is well-settled that judicial consideration of a statute's legislative history is an appropriate means of discerning that purpose. *See, e.g., Wisc. Pub. Intervenor* v. *Mortier*, 501 U.S. 597, 610 n.4 (1991) (citation omitted) ("Our precedents demonstrate that the Court's practice of utilizing legislative history reaches well into its past."); *accord Boumediene* v. *Bush*, Nos. 06-1195, 06-1196 2008 WL 2369628, at *11 (S. Ct. June 12, 2008) (noting that appeals court "was correct to take note of the legislative history when construing" the Military Commissions Act of 2006).

An examination of legislative history is appropriate even where, as here, the statute at issue is unambiguous. *See, e.g., Conroy* v. *Aniskoff*, 507 U.S. 511, 514 (1993) (examining legislative history of provision of Soldiers' and Sailors' Civil Relief Act after concluding that provision was "unambiguous" and "unequivocal," in order to refute argument that literal interpretation of statute would lead to absurd results). Moreover, to the extent that the statute is

viewed as ambiguous, the Court looks to legislative history to apply the statute consistently with legislative intent. *See Chapman*, 441 U.S. at 608; *see also Blum* v. *Stenson*, 465 U.S. 886, 896 (1984) ("Where, as here, resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear.").[4]

When read against the backdrop of its complete legislative record, the Fourth Circuit's argument that a §922(g)(9) predicate misdemeanor statute requires, as an element, a domestic relationship cannot withstand even minimal scrutiny.

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[4] This Court has also held that legislative history must be considered before resorting to the rule of lenity in construing a criminal statute. *See United States* v. *Granderson*, 511 U.S. 39, 54 (1994) ("[W]here text, structure, and *history* fail to establish that the Government's position is unambiguously correct[,] we apply the rule of lenity and resolve the ambiguity in [the defendant's] favor.") (emphasis added). Because the Fourth Circuit's reversal of Hayes' conviction was based in part on its application of the rule of lenity, this Court must examine the Amendment's legislative history before upholding the reversal on this ground.

II. THE LEGISLATIVE HISTORY DEMONSTRATES CONGRESS'S INTENT TO PROHIBIT GUN POSSESSION BY ALL DOMESTIC VIOLENCE MISDEMEANANTS, REGARDLESS OF WHETHER THE PREDICATE MISDEMEANOR STATUTE CONTAINS A DOMESTIC RELATIONSHIP ELEMENT.

The legislative history of the Lautenberg Amendment demonstrates that Congress's intent was simple and straightforward: to prohibit gun possession by *anyone* convicted of a misdemeanor that involved domestic violence. As Respondent concedes and the court below recognized, the Lautenberg Amendment was intended to extend the prohibition on gun possession and purchase by domestic abusers beyond those convicted of a felony. Cert. Pet. in Opp'n, at 7-9; *see also Hayes*, 482 F.3d at 752. Under Respondent's and the Fourth Circuit's view, however, this extension was meant to be limited to only those convicted under misdemeanor statutes that have a domestic relationship element. *See* Cert. Pet. in Opp'n, at 8; *Hayes*, 482 F.3d at 758-59.

Such a limitation on the Amendment cannot be sustained in the face of the clear evidence of Congressional intent to the contrary in the legislative history. That history leaves no doubt that the intent behind the Amendment was to close—completely and without limitation—the loophole in the current law that allowed domestic abusers to possess firearms when properly convicted under misdemeanor statutes for their acts of abuse. Moreover, the legislative history further reveals that the "as an element" language on which the Fourth Circuit's reasoning rests was inserted for one reason and one reason only: to address a narrow concern about the breadth of the scope of domestic violence conduct covered

by §922(g)(9), and not the scope of misdemeanor statutes covered by that provision.

A. Legislative History Demonstrates an Intent to Close the "Loophole" Created by Prosecutors' and Courts' Treatment of Domestic Violence Acts as Misdemeanor Offenses.

The legislative intent behind the Lautenberg Amendment was to extend the prohibition against gun ownership and possession by domestic violence felons under federal law to those domestic abusers whose acts resulted in conviction as misdemeanors. Senator Lautenberg explained this intent as he introduced the Amendment on the Senate floor:

> Under current Federal law, it is illegal for persons convicted of felonies to possess firearms. Yet, many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies. At the end of the day, due to outdated laws or thinking, perhaps after a plea bargain, they are, at most, convicted of a misdemeanor. In fact, most of those who commit family violence are never even prosecuted. But when they are, one-third of the cases that would be considered felonies, if committed by strangers, are instead filed as misdemeanors. The fact is that in many places domestic violence is not taken as seriously as other forms of brutal behavior. Often acts of serious spouse abuse are not even considered felonies.

142 Cong. Rec. 22,988 (1996). He stated that the Amendment "would close this dangerous loophole and keep guns away from violent individuals who threaten their own

families," emphasizing that "[d]omestic violence, *no matter how it is labeled*, leads to more domestic violence...." *Id.* (emphasis added).

Moreover, Senator Lautenberg left no ambiguity as to the Amendment's broad purpose of reaching all domestic abusers, regardless of the nature of the statute under which they were convicted:

> This amendment, very simply, would establish a policy of *zero tolerance* when it comes to guns and domestic violence. The amendment would prohibit *any* person convicted of domestic violence from possessing a firearm. In the simplest words, the amendment says that *a spouse abuser, wife beater, or child abuser should not have a gun.*

Id. Moreover, in addressing the impact of the amendment on local law enforcement's obligations under the Brady Law, he gave explicit recognition to inclusion in the statute of those crimes not expressly identified as domestic violence crimes: "[C]onvictions for domestic violence-related crimes often are for crimes, such as assault, that are not explicitly identified as related to domestic violence." 142 Cong. Rec. 26,675 (1996).

Senator Lautenberg was not alone in hailing the intent of the Amendment. On the day it was introduced, Senator Dianne Feinstein described the purpose of the Amendment in similar terms: "[W]e already prohibit convicted felons from possessing a firearm. But it is an unfortunate fact that many domestic violence offenders are never convicted of a felony. Outdated or ineffective laws often treat domestic violence as a lesser offense." 142 Cong. Rec. 22,988 (1996). Senator Patty Murray's floor statement also highlighted the

"misdemeanor loophole" the Amendment was intended to close, relating an example of the type of situation that the Amendment sought to prevent:

> One woman I know told me the story of her abusive ex-husband. He was physically abusive, and had been convicted of misdemeanors. ... [W]hen he came home one night, drunk, and yelling that the house wasn't clean enough for him. Because he was able to find the bullets, find the gun, load it, and point it at his wife. That she is alive today is a miracle....

142 Cong. Rec. 22,987 (1996).

These Senators' statements make clear the far-reaching intent of the Amendment: to keep firearms out of the hands of all individuals previously convicted of acts of domestic violence. Their intent, simply put, was to prevent gun-related acts of domestic violence by *all* prior domestic abusers, and not just those convicted under statutes having a domestic relationship element.

B. Legislative History Demonstrates That the Amendment's "As An Element" Language Served the Sole Purpose of Addressing the Scope of *Conduct* Covered by the Amendment, Not the Scope of *Misdemeanor Statutes*.

At no time during the debate on the Amendment did any lawmaker suggest that a domestic relationship must be an element of the predicate misdemeanor statute in order to sustain a conviction under §922(g)(9). The statements of Senator Lautenberg and his colleagues make clear that Congress intended the gun ban to reach *all* domestic violence perpetrators, regardless of whether the misdemeanor statute

under which they were convicted had a domestic relationship element. As a complete account of the legislative history—from conception to enactment—reveals, the "as an element" language at the crux of this interpretive dispute had never been part of Lautenberg's legislation or its legislative predecessors until the eve of the Amendment's enactment. Moreover, such language was added at that time for one reason and one reason only: to ensure that only crimes involving the use, attempted use, or threat of physical force could form the basis of a predicate misdemeanor under §922(g)(9). The addition of "as an element" to §922(g)(9) was not intended to impose a requirement that such predicate offenses have a domestic relationship element, a requirement that would have itself undermined the proclaimed broad purpose of the Amendment.

1. Prior Efforts to Enact Legislation Nearly Identical to the Lautenberg Amendment Never Considered Requiring a Domestic Relationship Element in the Underlying Misdemeanor Convictions.

Senator Lautenberg's introduction of the legislation enacted as §922(g)(9) did not occur in a legislative vacuum. Rather, it was the culmination of ongoing efforts by the Senator and other lawmakers to enact nearly identical legislation closing the dangerous domestic violence "loophole" in §922(g). The history of earlier definitions of a "misdemeanor crime of domestic violence" supports only the conclusion that Congress never considered including "as an element" in the legislation, in any of its incarnations, until hours before its enactment and for a purpose wholly unrelated to the Fourth Circuit's reading of the statute.

The effort to keep guns out of the hands of domestic violence misdemeanants began in the 103rd Congress. The

originally conceived bill would have prohibited anyone subject to a restraining order or convicted of a domestic violence misdemeanor from obtaining a gun. *See* 139 Cong. Rec. 25,490 (1993). It passed the Senate, but the House limited the law as enacted to prohibiting gun possession only by those subject to restraining orders. *See* 139 Cong. Rec. 28,487 (1993).

Senator Lautenberg first introduced his legislation on March 21, 1996. The first Lautenberg bill was nearly identical to the version that the House had defeated in 1993. It banned anyone under indictment for, or who had been convicted of, "any crime involving domestic violence" from acquiring a gun. 142 Cong. Rec. 5,840 (1996). It defined "crime involving domestic violence" as:

> a felony or misdemeanor crime of violence, regardless of length, term, or manner of punishment, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim under the domestic or family violence laws of the jurisdiction in which such felony or misdemeanor was committed.

Id. Critically, it did not contain any language requiring that certain "elements" be present in state statutes defining the predicate offense. Indeed, it did not include the word "element" at all. *Id.*

Senator Lautenberg succeeded in appending this legislation to the Interstate Stalking Punishment and Prevention Act. 142 Cong. Rec. 19,415 (1996). He faced

initial resistance regarding the bill's reach from Senator Kay Bailey Hutchison and others, who viewed the legislation as inappropriate for the stalking bill. 142 Cong. Rec. 26,674-77 (1996). By agreeing to drop the language criminalizing gun possession based solely on an indictment for a domestic violence misdemeanor, Senator Lautenberg overcame this resistance. *Id.*[5] He also agreed to insert language requiring that any predicate conviction be one for which the defendant was either represented by counsel or knowingly and intelligently waived his right to such counsel. *Id.* No other changes to the bill were proposed.

In the end, although the Senate passed the anti-stalking bill including this modified version of the Senator's amendment, *see* 142 Cong. Rec. at 26,674-76 (1996), the House failed to act on it. But the House's failure to act on the bill had nothing to do with the language in the Lautenberg Amendment. Moreover, nothing in the history of the Senator's negotiation and compromise regarding the Amendment so much as hints that anyone took issue with how the legislation defined "crime of violence." No one suggested that the Senator include anything "as an element" of the predicate misdemeanor offense for conviction under §922(g). Indeed, there was not a word of discussion, debate, or dispute about requiring a domestic relationship as an element of the predicate offense statute.

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[5] In a floor statement in support of the bill, Senator Hutchinson praised the compromise bill in terms similar to those of Senator Lautenberg: "Because of Senator Lautenberg's amendment, we are also going to be able to keep people who batter their wives or people with whom they live from having handguns." 142 Cong. Rec. 19,301 (1996).

2. The History of the Amendment's Enactment Demonstrates that the Eleventh-Hour Addition of the "As An Element" Language Was Intended to Address the Scope of *Conduct* Covered by the Amendment, Not the Scope of *Misdemeanor Statutes* Covered by it.

As the legislative history leading up to Senator Lautenberg's introduction of the Amendment demonstrates, no consideration was ever given to limiting this extension of the gun prohibition for criminals to only those misdemeanants convicted under statutes having a domestic relationship as an element. Moreover, the only difference between Senator Lautenberg's previous amendment included in the Anti-Stalking bill and the final Amendment as enacted was the insertion of the "as an element" language currently before the Court. However, as the legislative record reveals, this isolated modification of the language addressed a narrow concern raised on the eve of enactment: the scope of domestic violence-related *conduct* covered by the Amendment, and not the scope of *misdemeanor statutes*.

The Lautenberg Amendment ultimately was enacted into law as part of an Omnibus Appropriations bill in 1996. H.R. 3610, 104th Cong. (1996) (hereinafter, "Appropriations Act"). Senator Lautenberg offered his amendment, in a form identical to his previously proposed Amendments, on September 12, 1996. The Amendment was approved by the Senate by a voice vote of 97-2 that same day.[6]

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[6] Section 922(g)(9) was enacted as part of the Treasury, Postal Service, and General Government Appropriations Act, 19976, Pub. L. No. 104-208, Div. A, 110 Stat. 3009-314, which

(Continued ...)

When the Appropriations Act entered conference committee, however, the Lautenberg Amendment encountered significant resistance from Republican conferees. *See* 142 Cong. Rec. 25,001-02 (1996). Included among the proposed changes to the Amendment were limiting the misdemeanant ban to those entitled to a jury trial, limiting it to misdemeanants notified of the prohibition at the time of their conviction, and limiting it to misdemeanants who had abused their intimate partners (as opposed to their children). *Id.* However, there is nothing anywhere in the legislative record that suggests any objection to the Amendment's failure to require a domestic relationship as an element of the underlying predicate offense for a §922(g)(9) conviction.

In response to these objections, Senator Lautenberg agreed, on the night before the bill's final passage, to a number of changes in order to address its opponents' concerns. *See* 142 Cong. Rec. 26,674-77 (1996). He agreed to exempt from the ban those individuals who were wrongly denied a trial by jury (the other proposals described above were not incorporated into the Amendment). *Id.* In addition, and most critically, he agreed to revise the definition of "crime of violence" to address opponents' concerns that the term, which had been included in all prior versions of the Amendment, was too broad and could be interpreted as "cutting up a credit card with a pair of scissors." 142 Cong. Rec. 26,675 (1996). The language was changed to that of the version ultimately enacted, introducing for the first time the

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was in turn enacted as part of the Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009.

requirement that the predicate offense "have, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon . . .."

There is no evidence whatsoever in the legislative record that this new language arose from any concern other than the potential overbreadth of the phrase "crime of violence." There is simply no basis to conclude that the language revision was intended to add an additional requirement—that all predicate offense statutes have a domestic relationship "element"—to the new law.

The very next day, Senator Lautenberg gave a detailed explanation of the significance of this change on the Senate floor, providing critical insight as to the meaning of the newly added language:

> [T]he revised language includes a new definition of the crimes for which the gun ban will be imposed. Under the original version, these were defined as crimes of violence against certain individuals, essentially family members. Some argued that the term crime of violence was too broad, and could be interpreted to include an act such as cutting up a credit card with a pair of scissors. Although this concern seemed far-fetched to me, I did agree to a new definition of covered crimes that is more precise, and probably broader.
>
> *Under the final agreement, the ban applies to crimes that have, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon.* This is an improvement over the earlier version,

> which did not explicitly include within the ban crimes involving an attempt to use force, or the threatened use of a weapon, if such an attempt or threat did not also involve actual physical violence. *In my view, anyone who attempts or threatens violence against a loved one has demonstrated that he or she poses an unacceptable risk, and should be prohibited from possessing firearms.*

142 Cong. Rec. 26,675 (1996) (emphases added).

And moments later, addressing the import of the new provision as it would relate to background check requirements under the Brady law, Senator Lautenberg made clear the Congressional intent that the Lautenberg Amendment would apply to all domestic violence misdemeanor crimes, regardless of whether the predicate statute explicitly included the domestic relationship as an element. Sen. Lautenberg explained:

> Under the Brady law, local law enforcement authorities are required to make reasonable efforts to ensure that those who are seeking to purchase a handgun are not prohibited under Federal law from doing so. Mr. President, *convictions for domestic violence-related crimes often are for crimes, such as assault, that are not explicitly identified as related to domestic violence.* Therefore, it will not always be possible for law enforcement authorities to determine from the face of someone's criminal record whether a particular misdemeanor

> conviction involves domestic violence, as defined in the new law.

Id. (emphasis added).

These excerpts from the Senator's floor statements make clear what the addition of the "as an element" language in §921(a)(33)(A) was intended to do: require only that "the use or attempted use of physical force, or the threatened use of a deadly weapon" be an element of the predicate crime supporting a §922(g)(9) conviction. Indeed, the legislative history is void of any expression, either by committee or by any member of Congress, suggesting a contrary reading of this revised language. The Senator's statement provides authoritative proof that the addition of the "as an element" language addresses only the concern about the scope of *criminal conduct* that could serve as a basis for a §922(g)(9) conviction, and not about the scope of *criminal misdemeanor statutes*.

Statements made by other lawmakers in support of the Lautenberg Amendment throughout its consideration by Congress further confirm that the Amendment is concerned with the type of crime committed by the gun owner, and not the type of criminal misdemeanor statute under which he was convicted. Senator Feinstein, for example, stated that "[t]his amendment looks at the type of crime, rather than the classification of the conviction." 142 Cong. Rec. 22,988 (1996); *see also* 142 Cong. Rec. 22,987 (1996) (noting the importance of "taking guns away" from those convicted of violent crimes against loved ones). Similarly, Senator Dodd indicated (shortly after the enactment of the Amendment) that the law would "prevent anyone convicted of *any kind* of

domestic violence from owning a gun." 142 Cong. Rec. 27,264 (1996) (emphasis added).[7]

The legislative history of the Lautenberg Amendment—from conception to enactment—makes clear that Senator Lautenberg's reason for introducing his bill, and the Congress's intent in enacting it into law, was to keep guns out of the hands of *all* individuals who had been convicted of committing violence against loved ones, regardless of whether that violence was classified as a misdemeanor or a felony. The "as an element" language was added to the Amendment for one reason and one reason only: to limit the scope of crimes covered by §921(a)(33)(A), and not the scope of criminal misdemeanor statutes. The Fourth Circuit's reading of the Amendment simply cannot be reconciled with this history.

III. CONGRESS'S PRESUMED AWARENESS OF STATE AND FEDERAL LAW WHEN IT ENACTED THE LAUTENBERG AMENDMENT DEMONSTRATES ITS INTENT THAT THE AMENDMENT APPLY TO ALL DOMESTIC VIOLENCE MISDEMEANANTS.

In discerning legislative intent, it is presumed that Congress, when it enacts legislation, "is knowledgeable about existing law pertinent to the legislation it enacts." *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 185 (1988).

---

[7] Consistent with this legislative intent, the Conference Report for H.R. 3610 describes generally the Lautenberg Amendment as "amend[ing] Title 18 to deprive individuals convicted of a crime involving domestic violence of the right to own a firearm." H. Rep. No. 104-863, at 1173 (1996).

"It is always appropriate to assume that our elected representatives, like other citizens, know the law. . .." *Cannon* v. *Univ. of Chicago*, 441 U.S. 677, 696-97 (1979); *see also Director, Office of Workers' Compensation Programs* v. *Perini North River Assocs.*, 459 U.S. 297, 319 (1983) (same) (quoting *Cannon*, 449 U.S. 677). In light of this well-settled principle, this Court must therefore presume that Congress was aware of the State and Federal legal landscape at the time as related to domestic violence law.

Against this presumption, the Fourth Circuit's interpretation of the Lautenberg Amendment is unsustainable. In 1996, at the time Congress enacted the Amendment, only seventeen states and Puerto Rico had in effect misdemeanor laws that contained, as an element, a domestic relationship. *See United States* v. *Barnes*, 295 F.3d 1354, 1364 n.12 (D.C. Cir. 2002) (quoting *United States* v. *Smith*, 964 F. Supp. 286, 293 (1997)). Under the Fourth Circuit's reading of the Lautenberg Amendment, this would mean that Congress intended the Amendment to apply to only those eighteen jurisdictions, leaving the others effectively exempt from it. There is simply no indication in either the language of the statute or its legislative history that Congress intended to subject domestic violence misdemeanants to different criminal prohibitions depending on the state in which they were previously convicted. Absent any indication of such legislative intent, such an interpretation of the Amendment cannot withstand scrutiny. *See United States* v. *Turley*, 352 U.S. 407, 411 (1957) ("[I]n the absence of a plain indication of an intent to incorporate diverse state laws into a federal criminal statute, the meaning of the federal statute should not be dependent on state law."); *Dickerson* v. *New Banner Inst., Inc.*, 460 U.S. 103, 119-20 (1983) (absent plain indication to the contrary by Congress, federal laws are not to be construed so that their application is dependent on state law, "because the application of federal

legislation is nationwide and at times the federal program would be impaired if state law were to control"), *reh'g denied*, 461 U.S. 911 (1983); *accord Taylor* v. *United States*, 495 U.S. 575, 590 (1990) ("It seems to us to be implausible that Congress intended the meaning of 'burglary' for purposes of § 924(e) to depend on the definition adopted by the state of conviction.").

Similarly, Congress, in enacting the Amendment, must also be presumed to have been aware that there were no federal misdemeanor laws on the books at that time that had, as an element, a domestic relationship. Yet the Lautenberg Amendment expressly applies to those convicted of a "misdemeanor under *Federal*, State or Tribal law." 18 U.S.C. § 921(a)(33)(A)(i) (2000 & Supp. V) (emphasis added). The Fourth Circuit's reading of the Amendment would therefore render the express reference to Federal misdemeanor laws a dead letter, and is fatally flawed for this reason as well. *See TRW Inc.* v. *Andrews*, 534 U.S. 19, 32 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant.") (internal quotation marks and citation omitted); *United States* v. *Menasche*, 348 U.S. 528, 538-39 (1955) ("It is [the Court's] duty to give effect, if possible, to every clause and word of a statute.") (internal quotation marks and citation omitted).

IV. CONGRESSIONAL SILENCE IN THE FACE OF UNANIMOUS JUDICIAL AND ADMINISTRATIVE INTERPRETATIONS OF THE AMENDMENT DEMONSTRATES ITS INTENT THAT THE AMENDMENT APPLY TO ALL DOMESTIC VIOLENCE MISDEMEANANTS.

Beyond the clear import of the legislative intent of the Lautenberg Amendment, it is also significant that Congress has declined to amend the statute, despite the uniform view of the federal appellate courts and other government entities that the Amendment applies to all domestic violence misdemeanants, regardless of whether a domestic relationship is an element of the predicate offense statute. Indeed, until the Fourth Circuit's anomalous decision below, every court to consider it interpreted the Amendment consistent with Petitioner's position.[8] At least two governmental entities have agreed with these courts. *See* 27 C.F.R. § 478.11 (1998) (Bureau of Alcohol, Tobacco and

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[8] *See United States* v. *Heckenliable*, 446 F.3d 1048, 1049 (10th Cir. 2006), *cert. denied*, 127 S. Ct. 287 (2006); *United States* v. *Belless*, 338 F.3d 1063, 1067 (9th Cir. 2003); *White* v. *Dept. of Justice*, 328 F.3d 1361, 1364-67 (Fed. Cir. 2003); *United States* v. *Shelton*, 325 F.3d 553, 562 (5th Cir. 2003); *United States* v. *Barnes*, 295 F.3d 1354 (D.C. Cir. 2002); *United States* v. *Kavoukian*, 315 F.3d 139, 142-44 (2d Cir. 2002); *United States* v. *Chavez*, 204 F.3d 1305, 1313-14 (11th Cir. 2000); *United States* v. *Meade*, 175 F.3d 215, 218-21 (1st Cir. 1999); *United States* v. *Smith*, 964 F. Supp. 286 (N.D. Iowa 1997), *aff'd*, 171 F.3d 617 (8th Cir. 1999); *United States* v. *Cary*, No. 1:07-cr-74-WSD, 2008 WL 80650 (N.D. Ga. Jan. 4, 2008); *United States* v. *Pfeiffer*, 206 F. Supp. 2d 1002 (D.S.D. 2002); *United States* v. *Blosser*, No. 02-40074-01-JAR, 2002 WL 31261170 (D. Kan. Oct. 4, 2002).

Firearms regulation); CRS Report for Congress Order No. RL31143, *Firearms Prohibitions and Domestic Violence Convictions: The Lautenberg Amendment*, at 2 (T.J. Halstead, dated Oct. 1, 2001); CRS Report for Congress Order No. 97-68A, *Gun Ban For Persons Convicted of Misdemeanor Crime Of Domestic Violence: Ex Post Facto And Other Constitutional Issues*, at 4 (Dorothy Schrader, dated Dec. 30, 1996). In particular, the Bureau of Alcohol, Tobacco and Firearms, in promulgating its regulation, was explicit in their interpretation of the Lautenberg Amendment:

> The definition of misdemeanor crime of domestic violence includes all offenses that have as an element the use or attempted use of physical force (*e.g.*, assault and battery) if the offense is committed by one of the defined parties. This is true whether or not the State statute specifically defines the offense as a domestic violence misdemeanor. For example, a person convicted of misdemeanor assault and battery against his or her spouse would be prohibited from receiving or possessing firearms or ammunition.

Implementation of Public Law 104208, Omnibus Consolidated Appropriations Act of 1997, 63 Fed. Reg. 35,520, at 35,521 (1998).

Faced with this near universal agreement among courts and government entities, one would think that Congress would seek to change the language of the statute if it believed that all of these entities had incorrectly interpreted it. However, Congress has remained conspicuously silent on the issue, which suggests that the consensus view correctly captures legislative intent. *See, e.g.*, *General Dynamics Land Systems, Inc.* v. *Cline*, 540 U.S. 581, 593-94 (2004) (noting

that "[t]he Courts of Appeals and district Courts ... prior to this case have enjoyed virtually unanimous accord in understanding the ADEA to forbid only discrimination preferring young to old.... The very strength of this consensus is enough to rule out any serious claim of ambiguity, and congressional silence after years of judicial interpretation supports adherence to the traditional view.").

Most significantly, Congress revisited the Lautenberg Amendment as recently as 2006, without a single concern raised, or comment made, as to the meaning of the "as an element" language. On January 5, 2006, as part of the reauthorization of the Violence Against Women Act, Congress amended §921(a)(33)(A) to add Tribal law among the predicate misdemeanor offense statutes for conviction under §922(g)(9). *See* Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109-162, 119 Stat. 2960 (2005). By this time, eight federal courts of appeals had already held that a domestic relationship is not a required element of a "misdemeanor crime of domestic violence." The ATF regulation reflecting the same interpretation had been in place for over *nine* years. Had these interpretations been erroneous, Congress could have changed the law. It declined to do so, with not a single reference in the legislative record to any attempt to modify that portion of the Amendment.[9]

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[9] Congress also declined to amend the law in 1997 after Senator Lautenberg's clear statements of intent on the Senate floor following the Amendment's passage in 1996, when it revisited the Amendment only to address the lack of a public safety exemption to the domestic violence misdemeanor gun ban. *See* H.R. 445, 105th Cong. (1st. Sess. 1997); S. 262, 105th Cong. (1st. Sess. 1997).

Senator Lautenberg was clear that the Amendment applied to all offenders convicted of violent crimes, whether misdemeanor or felony, committed against loved ones. Almost every federal court of appeals has agreed, Congress's implicit refusal to modify the Amendment in light of this near unanimity is a strong indication of Congressional agreement with the prevailing interpretation.

CONCLUSION

For the reasons set forth above, the Court should reverse the judgment of the Fourth Circuit.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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UNITED STATES OF AMERICA,
Petitioner,

v.

RANDY EDWARD HAYES,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE NATIONAL NETWORK TO END DOMESTIC VIOLENCE, THE DOMESTIC VIOLENCE LEGAL EMPOWERMENT AND APPEALS PROJECT (DV LEAP),
(continued on inside cover)

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INTEREST OF *AMICI CURIAE*[1]

Amici include numerous non-profit organizations devoted to remedying domestic violence through legal, legislative, and policy initiatives, as well as organizations providing shelter, advocacy, and legal and counseling services to survivors of domestic violence. *Amici* collectively have hundreds of years of experience working with survivors of domestic violence, including undertaking extensive efforts to improve the justice system's response to victims of domestic violence.

Amici are extremely concerned about the Fourth Circuit's interpretation of the Lautenberg Amendment and the impact this interpretation has on victims of domestic violence. For these reasons, therefore, *Amici* are submitting this brief in support of the Petitioner.[2]

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[1] Pursuant to Sup. Ct. R. 37.6, *Amici Curiae* state that no counsel representing a party authored this brief in whole or in part, and no person or entity other than the *Amici Curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

[2] Pursuant to Sup. Ct. R. 37.3(a), counsel of record for both Petitioner and Respondent have consented to the filing of this brief in letters/emails that have been lodged with the Clerk. The identities and interest of *Amici* are described in the Appendix to this brief.

SUMMARY OF ARGUMENT

In recognition of the urgent need to close a loophole in the framework of federal firearms laws designed to keep firearms out of the hands of known domestic abusers, Congress enacted the Lautenberg Amendment in 1996, which made it illegal for persons convicted of misdemeanor crimes of domestic violence to possess or purchase a firearm. In defining the triggering offenses that will invoke the firearm ban, the plain language of the statute clearly demonstrates that Congress did not require that the offender be convicted under a statute containing a domestic relationship as an element of the offense. Even assuming, purely for the sake of argument, that the plain language of the statute is somehow ambiguous, the legislative history surrounding the Lautenberg Amendment, including the floor statements of the bill's sponsor, clearly and irrefutably demonstrate that Congress did not intend to require a domestic relationship as an element of the predicate offense. Indeed if, as the Fourth Circuit has concluded, the domestic relationship element is required, then the Lautenberg Amendment is rendered largely meaningless. For these reasons, the Fourth Circuit's anomalous interpretation—contrary to the conclusions of the nine other circuit courts to have addressed this question—is erroneous and should be overturned.

ARGUMENT

I. THE LAUTENBERG AMENDMENT ADDRESSED THE URGENT NEED TO REMOVE GUNS FROM THE HANDS OF DOMESTIC ABUSERS

In 1996, in recognition of the startling reality that the federal ban on firearm ownership by felons and persons subject to a protection order had inadvertently overlooked the majority of domestic abusers, Congress enacted the "Gun Ban for Individuals Convicted of a Misdemeanor Crime of Domestic Violence," frequently referred to as the "Lautenberg Amendment" after its sponsor, Senator Frank Lautenberg (D–New Jersey).[3] The Lautenberg Amendment closed a glaring loophole in the framework of the federal firearms laws by extending the ban, which had previously proscribed firearm ownership by convicted felons and domestic violence offenders who had protection orders entered against them, to also apply to individuals who had been "convicted in any court of a misdemeanor crime of domestic violence."[4] The statistics demonstrating the need for this legislation are as compelling as they are grim.

A. Gun Ownership by Persons with a History of Committing Domestic Violence Substantially Increases the Risk of Death and Injury to the Victims of These Offenders and Imposes Tremendous Societal Costs

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[3] *See* Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

[4] 18 U.S.C. § 922(g)(9) (2000 & Supp. V 2005).

To understand the societal ramifications of permitting known domestic abusers to own firearms, it is important to first consider the statistics regarding the pervasiveness of domestic violence in the United States. Each year, intimate partners[5] commit an estimated 322,230 rapes and 4.5 million physical assaults against women; an additional 2.9 million physical assaults are committed against men.[6] Some 22% of women and 7% of men report having been physically assaulted by an intimate partner.[7] Two-thirds of women who have been physically assaulted by their intimate partners report being victimized more than once by the same partner.[8] Although women comprise a large portion of the victims of domestic violence,[9] the problem of domes-

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[5] For the purposes of this brief, "intimate partner" refers to a current or former spouse, parent, or guardian; a person with whom another shares a child in common; a person who is cohabiting with or has cohabited with another as a spouse, parent, or guardian; or a person similarly situated to a spouse, parent, or guardian of the victim.

[6] Patricia Tjaden & Nancy Thoennes, U.S. Dep't of Justice, *Extent, Nature, and Consequences of Intimate Partner Violence: Findings From The National Violence Against Women Survey* 55 (2000). For the purposes of this study, "intimate partners" means "current and former dates, spouses and cohabiting partners, with cohabiting meaning living together at least some of the time as a couple." *Id.* at 5.

[7] Ctr. for Gun Policy and Research, Johns Hopkins Univ., *Factsheet: Firearms and Intimate Partner Violence* (2003), *available at* http://www.jhsph.edu/gunpolicy/IPV_firearms2.pdf.

[8] Tjaden & Thoennes, *supra* note 5, at 39.

[9] Matthew R. Durose et al., U.S. Dep't of Justice, *Family Violence Statistics: Including Statistics on Strangers and Acquaintances* 10 (2005) (reporting that women comprise approximately 85% of domestic violence victims); Nat'l Ctr. for Injury Prevention and Control, Ctrs. for Disease Control and Preven-

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tic violence is one that transcends gender and cuts across all demographic lines.[10/]

In all too many of these cases, encounters that begin as domestic violence assaults escalate into lethal encounters. The risk of lethal escalation is particularly acute during the time the victim is leaving the relationship, meaning that the danger is greatest for many domestic violence victims just as they have made the decision to seek help.[11/] The severe risk that domestic violence offenders pose to their victims is illustrated by statistics concluding that more than one in ten homicide victims in this country were killed by an intimate partner.[12/] Over 30% and per-

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tion, *Costs of Intimate Partner Violence Against Women in the U.S.* 3 (2003) [hereinafter *Costs of Violence*]; Callie Marie Rennison, U.S. Dep't of Justice, *Intimate Partner Violence, 1993–2001* NCJ197838 (2003) (noting that in 2001, 85% of the victims of intimate partner violence were women).

10/ *See* Durose et al., *supra* note 8, at 10-11 (reporting statistics concerning demographic characteristics of domestic violence offenders); Lawrence A. Greenfeld et al., U.S. Dep't of Justice, *Violence By Intimates: Analysis of Data on Crimes by Current or Former Spouses, Boyfriends, and Girlfriends*, NCJ167237 (1998); Tjaden & Thoennes, *supra* note 5, at 25.

11/ *See, e.g.*, Darren Mitchell & Susan B. Carbon, *Firearms and Domestic Violence: A Primer for Judges*, Ct. Rev., Summer 2002, at 32 (noting the phenomenon of "separation violence"); Margo Wilson & Martin Daly, *Spousal Homicide Risk and Estrangement*, 8 Violence & Victims 3, 4 (1993) (finding that "actual or imminent separation is highly relevant to risk.").

12/ *See* James Alan Fox & Marianne W. Zawitz, *Homicide Trends in the United States* (2007), http://www.ojp.usdoj.gov/bjs/homicide/intimates.htm.

haps as many as 40–50% of female murder victims are killed by intimate partners.[13]

Studies demonstrate that the involvement of a gun during an incident of domestic violence significantly increases the probability—making it twelve times more likely—that the encounter will result in a homicide.[14] For this reason, in his Senate statements in support of the gun ban, Senator Paul Wellstone (D–MN) correctly observed that "often, the only difference between a battered woman and a dead woman is the presence of a gun."[15] In 2005, guns resulted in the deaths of 678 women who were shot and killed by intimate partners.[16]

Even in domestic violence incidents involving firearms in which the victim is not killed, he or she is very frequently injured.[17] Researchers at the Har-

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[13] Fox & Zawitz, *supra* note 11; Jacquelyn C. Campbell et al., *Assessing Risk Factors for Intimate Partner Homicide*, NIJ J., Nov. 2003, at 18; Rennison, *supra* note 8, at 2 (reporting that "about 33% of female murder victims ... were killed by an intimate.").

[14] *See* Linda E. Saltzman et al., *Weapon Involvement and Injury Outcomes in Family and Intimate Assaults*, 267 JAMA 3043, 3043 (1992) (noting that research indicates that gun involvement increases the likelihood that an assault will result in homicide).

[15] *See* 142 Cong. Rec. S10,377, 10,378 (daily ed. Sept. 12, 1996) (statement of Sen. Wellstone).

[16] Fox & Zawitz, *supra* note 11.

[17] *See generally* Kathryn Ann Farr, *Battered Women Who Were "Being Killed and Survived It": Straight Talk From Survivors*, 17 Violence & Victims 267 (2002) (detailing victims' stories of having survived near-lethal domestic violence). The stories of the survivors of these attacks are shocking. One woman was brutally beaten with a gun; after the beating the attacker then forced the gun into her mouth and pulled the trigger. *Id.*

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vard School of Public Health have concluded that incidents where a gun is brandished "against family members may be more common than gun use in self-defense, and that hostile gun displays are often acts of domestic violence directed against women."[18] Guns can be, and frequently are, used in a threatening manner without actually being fired. For example, armed offenders may brandish a gun without firing it, and take advantage of the victim's fear of being shot to push, hit, or kick the victim.[19] Thus, while domestic violence incidents involving firearms sometimes result in fatalities, almost half of firearm-related domestic violence incidents result in nonfatal injuries.[20]

Studies strongly indicate that just having access to a gun increases the likelihood that domestic violence will end in fatality—regardless of whether the gun is actually used. In a leading study of individual risk factors for homicide, an abuser's access to a firearm was found to be strongly associated with domestic violence homicide.[21] Similarly, an abuser's previous use of a weapon to threaten the victim was

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at 277. The victim survived only because the gun misfired. *Id.* Another woman's leg was shot with a rifle and essentially destroyed; what remained had to be amputated. *Id.*

[18] Deborah Azrael & David Hemenway, *"In the Safety of Your Own Home": Results from a National Survey on Gun Use at Home*, 50 Soc. Sci. & Med. 285, 290 (2000).

[19] *Id.* (noting that "[m]ost of the hostile gun displays in [the] survey were gun brandishings by intimates against women, designed to frighten and threaten them"); Saltzman et al., *supra* note 13, at 3044.

[20] *See* Saltzman et al., *supra* note 13, at 3044.

[21] *See* Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 Am. J. of Pub. Health 1089, 1090 (2003).

found to significantly increase the risk of death.[22] Merely having access to firearms results in a five-fold increase in the risk of death during an incident of domestic violence.[23] In short, access to firearms is, quite simply, "a key factor in the escalation of nonfatal spousal abuse to homicide."[24]

Beyond the obvious personal toll this gun-related domestic violence causes to the victims, their children, and their families, the larger social impact of such violence is enormous. Domestic violence is responsible for over 2 million injuries each year, and more than 550,000 of those injuries require medical attention.[25] More than 145,000 of those injuries require hospitalization for one or more nights.[26] Domestic violence also wreaks nonphysical injury upon its victims, accounting for over 18.5 million mental health care visits each year. In addition, a significant financial burden is imposed as well. The total costs of medical care (including mental health care) resulting from domestic violence incidents approaches $4.1 billion per year, significant portions of which are paid for by government programs.[27] Intimate partner violence against women results in victims

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22 *See id.*

23 *See id.* at 1092.

24 Violence Policy Ctr., *When Men Murder Women: An Analysis of 2003 Homicide Data: Females Murdered by Males in Single Victim/Single Offender Incidents* 13 (2005).

25 *Costs of Violence*, *supra* note 8, at 19.

26 *Id.*

27 *See* Philip J. Cook et al., *The Medical Costs of Gunshot Injuries in the United States*, 281 JAMA 447, 453 (1999) (concluding that for gunshot injuries, the government pays for approximately half the total lifetime treatment costs); *Id.* at 30 (noting total health care costs per year).

missing almost 8 million paid days of work each year—a loss to the national economy equivalent to 32,114 full-time jobs.[28] Domestic violence also consumes a substantial amount of the resources of state law enforcement and judicial systems.[29] A consideration of the societal impact of domestic violence must therefore include both these personal and economic "costs."

B. The Lautenberg Amendment Closed a Loophole in Federal Law that Inadvertently Permitted Gun Possession by Dangerous Perpetrators of Domestic Violence

Prior to the enactment of the Lautenberg Amendment in 1996, federal law already prohibited convicted felons from possessing firearms.[30] In addition, federal law prevented a person from possessing firearms if he had a current "qualifying" protection order issued against him.[31] Yet, despite these triggering provisions, the federal firearm ban was only rarely applied to domestic abusers, in part because domestic violence offenses are, for a variety of reasons, frequently either charged or pled out as mis-

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28 *Costs of Violence*, *supra* note 8, at 19.

29 *See* Erica L. Smith et al., U.S. Dep't of Justice, *State Court Processing of Domestic Violence Cases* NCJ214993 (2008) (analyzing the case processing outcomes for domestic violence cases in 15 large urban counties); Tjaden & Thoennes, *supra* note 5, at 53 (noting that law enforcement personnel receive almost 2 million reports of domestic violence annually).

30 *See* 18 U.S.C. § 922(g)(1) (1994).

31 *See id.*

demeanors.[32] In fact, the single most common court action taken in response to a victim's complaint of domestic violence is the issuance of a civil protection order.[33] For this reason, the pre-1996 statute proscribed firearm possession and purchase by individ-

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[32] *See, e.g.*, Editorial, *Why Give Wife-Beaters Guns?*, N.Y. Times, May 31, 1996, at A24 (noting that "acts of domestic violence are often prosecuted as misdemeanors, either as part of a plea-bargain deal or because of weak state laws that treat domestic violence far too lightly"). Many crimes of domestic violence plead out as misdemeanors because of the difficulty and expense of taking a case to trial where it is likely that the victim will be uncooperative or recant, and where the accused is likely to mount a vigorous defense given the potential harsh penalties. *See, e.g.*, Jennifer L. Vainik, *Kiss, Kiss, Bang, Bang: How Current Approaches to Guns and Domestic Violence Fail to Save Women's Lives*, 91 Minn. L. Rev. 1113, 1139 (2007) (discussing the circumstances that frequently result in plea bargains for domestic violence cases); Robert A. Mikos, *Enforcing State Law in Congress's Shadow*, 90 Cornell L. Rev. 1411, 1441 (2005) (noting that Congress enacted the Lautenberg Amendment to "stop state prosecutors from skirting the Gun Control Act in domestic abuse cases by extending the firearms prohibition to misdemeanor crimes as well as felonies"); Emily J. Sack, *Confronting the Issue of Gun Seizure in Domestic Violence Cases*, 6 J. for Center for Fams., Child., Cts. 3, 4 (2005) (commenting on the frequency with which crimes of domestic violence are "undercharged or pleaded down to misdemeanors").

[33] *See* Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can the Law Help End Abuse Without Ending the Relationship?*, 29 Cardozo L. Rev. 1487, 1489, 1503-04 (2008) ("Civil protection orders have emerged as the most frequently used and, in the view of many experts, the most effective legal remedy against domestic violence."); Jane C. Murphy, *Engaging With The State: The Growing Reliance On Lawyers And Judges To Protect Battered Women*, 11 Am. U. J. Gender, Soc. Pol'y & L. 499, 502 (2003) (observing that the civil protection order is one of the most common legal remedies used for battered women).

uals subject to a protection order. After protection orders, however, misdemeanor guilty pleas and adjudications constitute a very significant portion of the ultimate outcomes of domestic violence cases.[34] These outcomes, paradoxically, did not invoke the federal firearm ban under the pre-1996 statute.

Senator Lautenberg commented on this reality when introducing the Legislation at issue here:

> [M]any people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies. At the end of the day, due to outdated laws or thinking, perhaps after a plea bargain, they are, at most, convicted of a misdemeanor. In fact, most of those who commit family violence are never even prosecuted. But when they are, one-third of the cases that would be considered felonies, if committed by strangers, are instead filed as misdemeanors. ***The fact is that in many places domestic violence is not taken as seriously as other forms of brutal behavior.*** Often acts of serious spousal abuse are not even considered felonies.[35]

Effectively, an offender would lose his right to possess a gun if he assaulted a stranger and was charged with a felony, or if he was merely civilly restrained from abusing a family member, but the same offender could keep his gun if he assaulted an intimate partner and was—as is still usual—

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[34] Smith et al., *supra* note 28.

[35] 142 Cong. Rec. S10,377, 10,377-78 (daily ed. Sept. 12, 1996) (statement of Sen. Lautenberg) (emphasis added).

prosecuted for a misdemeanor. Thus the vast majority of criminally prosecuted batterers were allowed firearms while the merely civilly restrained batters were not. The Lautenberg Amendment was aimed at correcting this situation by ensuring that crimes of domestic violence, even if characterized as misdemeanors, were covered by the firearm ban.[36]

Therefore, in recognition of the critical need to prohibit gun ownership by those who have previously committed or threatened violent acts against a spouse, intimate partner, or child cohabiting with him or her, Congress added language to the federal gun ban statute to prohibit possession, shipment and transport, receipt, or return of firearms by those convicted of misdemeanor crimes of domestic violence. As one Court of Appeals aptly observed, those individuals are "people whose past violence in domestic relationships makes them untrustworthy custodians of deadly force."[37] Senator Lautenberg, in his Senate statements, put it more bluntly:

> There is no reason for someone who beats their wives or abuses their children to own a gun. When you combine wife beaters and guns, the end result is more death. . . . This amendment would close this dangerous loo-

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[36] *See United States v. Barnes*, 295 F.3d 1354, 1364 (D.C. Cir. 2002) (recognizing that the Lautenberg Amendment was "enacted in order to remedy the nationwide problem that those convicted of a felony involving domestic assault were prohibited from firearms possession while those convicted of a misdemeanor involving domestic assault were not.").

[37] *United States v. Belless*, 338 F.3d 1063, 1067 (9th Cir. 2003).

phole and keep guns away from violent individuals who threaten their own families.[38]

In short, the clear and unambiguous legislative purpose behind the Lautenberg Amendment was to fill the loophole in federal law and to remove firearms from the hands of known perpetrators of domestic violence.

II. THE PLAIN LANGUAGE OF THE LAUTENBERG AMENDMENT REFUTES THE FOURTH CIRCUIT'S STRAINED INTERPRETATION

Until now, the federal circuit courts of appeals have uniformly interpreted the Lautenberg Amendment in accordance with its purpose—to take firearms out of the hands of known perpetrators of domestic violence nationwide. Each of the nine other circuit courts to have considered the issue construed the statute to impose a firearms ban on persons convicted of a misdemeanor offense against a victim who was in a domestic relationship with the offender, whether or not the existence of such a domestic relationship was a statutory element of the underlying misdemeanor offense.[39] The result has been that in

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[38] 142 Cong. Rec. S10,377, 10,378 (daily ed. Sept. 12, 1996) (statement of Sen. Lautenberg).

[39] *See United States v. Heckenliable*, 446 F.3d 1048, 1050 (10th Cir. 2006); *Belless*, 338 F.3d at 1067 (9th Cir. 2003); *White v. Dep't of Justice*, 328 F.3d 1361, 1364-67 (Fed. Cir. 2003); *United States v. Shelton*, 325 F.3d 553, 561-62 (5th Cir. 2003); *United States v. Kavoukian*, 315 F.3d 139, 142-45 (2d Cir. 2002); *Barnes*, 295 F.3d at 1358-61 (D.C. Cir. 2002); *United States v. Chavez*, 204 F.3d 1305, 1313-1314 (11th Cir. 2000); *United States v. Meade*, 175 F.3d 215, 218-221 (1st Cir. 1999); *United States v. Smith*, 171 F.3d 617, 619-620 (8th Cir. 1999).

the ten years following the enactment of the Lautenberg Amendment, over 150,000 attempted gun purchases by people convicted of domestic violence crimes were blocked.[40/]

In enacting the Lautenberg Amendment, Congress made it unlawful for any person "who has been convicted in any court of a misdemeanor crime of domestic violence . . . [to] possess in or affecting commerce, any firearm or ammunition."[41/] The Amendment defines "misdemeanor crime of domestic violence" as follows:

> (33)(A) Except as provided in subparagraph (C), the term "misdemeanor crime of domestic violence" means an offense that—
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> (i) is a misdemeanor under Federal, State, or Tribal law; and
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> (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the

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40/ *See* Office of Senator Frank R. Lautenberg, U.S. Senate, *The Domestic Violence Gun Ban Ten Years Later: Lives Saved, Abusers Denied* (2006), *available at* http://lautenberg.senate.gov/documents/domestic/THE%20DOMESTIC%20VIOLENCE%20GUN%20BAN.pdf

41/ 18 U.S.C. § 922(g)(9).

> victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim[.][42]

The application of the amendment therefore turns on the definition of the predicate offense. The Fourth Circuit, contrary to the nine other circuit courts to have considered this issue, concluded that the predicate offense must contain a domestic relationship element. According to the Fourth Circuit, this result is compelled because the statutory definition "plainly provides, in its clause (ii), that the predicate offense must have as an element one of certain specified domestic relationship between the offender and the victim."[43] The "natural reading" of the statute espoused by the Fourth Circuit "requires that the predicate offense have as an element a relationship component."[44]

Even a cursory review of the definition, however, reveals the error in the Fourth Circuit's interpretation. As correctly recognized by a number of circuit courts, the definition speaks plainly in terms of a singular "element"—the use or attempted use of physical force or threat with a deadly weapon.[45]

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[42] 18 U.S.C. § 921(a)(33)(A) (2000 & Supp. V 2005).

[43] *See United States v. Hayes*, 482 F.3d 749, 752 (4th Cir. 2007).

[44] *Id.* at 756.

[45] *See, e.g.*, *Heckenliable*, 446 F.3d at 1050 ("Congress's use of the singular noun 'element' is indicative that the misdemeanor offense only requires one element, namely, the use of force."); *Belless*, 338 F.3d at 1066 ("The definition ... speaks only of a single element rather than in the plural."); *Meade*, 175

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This strongly indicates that Congress required the predicate offense to have only that single element, and that the "use of force" and "committed by" clauses are not to be considered together as comprising a single element. Indeed, this would be an absurd reading, given the sharp conceptual distinctions between these clauses. While the Fourth Circuit suggests that the "natural" reading is that when Congress says "element" it really means "the following elements," it is far more natural and reasonable to read the statute as it is written, with reference to only one element. The "committed by" language thus does not create an additional element, but modifies the earlier reference to the criminal offense. The most natural and logical reading of the definition, therefore, is that a qualifying "misdemeanor crime of domestic violence" is (1) a misdemeanor, as defined by statute; (2) whose statutory framework includes, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon; and (3) which can be shown, through information in the court record, to have been committed by a person having a domestic relationship with the victim.

F.3d at 218-19 ("The word 'element' ... is singular, and, absent evidence that Congress wished to deviate from customary usage, it should be read to refer only to the immediately following attribute."); *Smith*, 171 F.3d at 620 ("If Congress meant the predicate misdemeanor to have two elements, it would have used the plural form of 'element.'").

III. THE FOURTH CIRCUIT'S STATUTORY CONSTRUCTION CONTRADICTS THE INESCAPABLE PURPOSE AND INTENT OF THE AMENDMENT, RENDERING IT NONSENSICAL

As discussed above, the plain language of the statute, applying the ordinary meanings to the words Congress used, indicates no requirement that the predicate offense include a domestic relationship as an element of the offense. Even assuming, however, purely for the sake of argument, that the statutory language is ambiguous, the Fourth Circuit's strained statutory interpretation should be rejected for the additional reason that it would render the Lautenberg Amendment essentially meaningless. This Court's role is "to make sense rather than nonsense out of the *corpus juris*" when construing statutes.[46] While criminal statutes are to be construed strictly, "this does not mean that every criminal statute must be given the narrowest possible meaning in complete disregard of the purpose of the legislature."[47] Here, the purpose behind the enactment of the amendment is clear. Because Congress cannot be assumed to have enacted a law with no effect, the Fourth Circuit's interpretation cannot be correct.

At the time the Lautenberg Amendment was enacted in 1996, only 17 states had in place domestic violence misdemeanor laws that included a domestic relationship between the offender and the victim as

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[46] *W. Va. Univ. Hosps. v. Casey*, 499 U.S. 83, 101 (1991) (Scalia, J.)

[47] *United States v. Turley*, 352 U.S. 407, 413 (1957).

an element of the offense.[48] In addition, no federal misdemeanor had as an element a domestic relationship between the offender and victim. Thus, if the Fourth Circuit's interpretation is correct, the Lautenberg Amendment was an immediate dead letter,[49] and of no force and effect, in the substantial majority of the states—including Senator Lautenberg's home state of New Jersey, which is among the states that did not have (and still today does not have) a domestic violence misdemeanor statute.

The Fourth Circuit's statutory construction here directly contravenes the "basic axiom" that "courts should construe all legislative enactments to give them some meaning."[50] Similarly, "interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."[51] There is simply no conceivable reason why Congress, having identified compelling public policy reasons to

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48 *Barnes*, 295 F.3d at 1365 n.12.

49 Courts generally strive to avoid interpretations of a statute rendering the law ineffective. *See, e.g., United States v. Atl. Research Corp.*, 127 S. Ct. 2331, 2337 (2007) (declining to adopt the government's interpretation of a provision of the Comprehensive Environmental Response, Compensation, and Liability Act that would have reduced the number of potential plaintiffs to almost zero). Even an interpretation resulting in surplusage is favorable to one resulting in a dead letter. *Id.* ("It is appropriate to tolerate a degree of surplusage rather than adopt a textually dubious construction that threatens to render the entire provision a nullity.").

50 *Rosado v. Wyman*, 397 U.S. 397, 415 (1970); *see also Heckenliable*, 446 F.3d at 1051 ("Our interpretation must give practical effect to Congress's intent, rather than frustrate it.").

51 *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) (Rehnquist, J.).

keep firearms out of the hands of known perpetrators of domestic violence, would have adopted a ban that would be entirely ineffectual and would allow batterers to continue to own firearms in the substantial majority of the country, including in the home state of the bill's sponsor. For this reason alone, the Fourth Circuit's illogical interpretation should be rejected in favor of the construction applied by every other circuit court to have considered the issue.

Moreover, it remains the case today that less than half of the states have in place misdemeanor assault or battery statutes that include the existence of an intimate partner relationship as an element of the offense.[52/] Accordingly, if the Fourth Circuit's construction is upheld, the Lautenberg Amendment will have no applicability whatsoever in more than half the country. This interpretation is unquestionably contrary to Congress' intent; after all, having recognized the problem and taken Congressional action, there can be no doubt that Congress intended to enact a national remedy. Had Congress sought to leave this decision to individual states, it simply would have allowed the states to continue to adopt state firearms bans on a piecemeal basis.[53/] It is in-

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52/ Hayes' opp. to cert., at 3.

53/ When the Lautenberg Amendment was enacted, the state statutes in place addressing domestic violence misdemeanors included: Ark. Code Ann. § 5-26-305 (LexisNexis 1995) and *id.* §§ 5-26-307 to 5-26-309; Cal. Penal Code § 243(e)(1) (West 1997); Ga. Code Ann. § 16-5-23.1(f) (LexisNexis 1996); Haw. Rev. Stat. § 709-906 (LexisNexis 1996); Idaho Code § 18-918 (LexisNexis 1996); 720 Ill. Comp. Stat. Ann. 5/12-3.2 (West 1996); Iowa Code Ann. § 708.2A (West 1996); Mich. Comp. Laws Ann. § 750.81(2)-(3) (West 1996); Minn. Stat. Ann. § 609.2242 (West 1997); Mont. Code Ann. § 45-5-206 (West 1996); N.M.

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conceivable that Congress enacted a national firearms ban for domestic violence misdemeanants which would apply in a minority of states, particularly without any discussion whatsoever of the existing patchwork of state laws.

Finally, even in those states that do have misdemeanor statutes which specify a domestic relationship as an element of the offense, the Fourth Circuit's interpretation would put the federal misdemeanor firearm ban at the mercy of the vagaries of prosecutorial discretion. Prosecutors often charge defendants with traditional misdemeanors such as assault and battery, even when a domestic violence misdemeanor statute is available. Thus, even in the minority of states with domestic violence misdemeanor statutes, the Fourth Circuit's interpretation could result in dangerous batterers such as Mr. Hayes being nonetheless exempt from the Lautenberg Amendment's firearm ban merely by virtue of prosecutorial discretion. Yet Congress enacted the Lautenberg Amendment specifically in order to curtail the prosecutorial discretion that allowed circumvention of the federal firearm ban by under-charging domestic violence.[54/] It defies logic to suggest that

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Stat. Ann. § 30-3-12 (West 1996) and *id.* § 30-3-15 ; Ohio Rev. Code Ann. § 2919.25 (West 1997); Okla. Stat. Ann. tit. 21, § 644(C) (West 1997); S.C. Code Ann. § 16-25-20 (LexisNexis 1996); Vt. Stat. Ann. tit. 13, § 1042 (LexisNexis 1996); Va. Code Ann. § 18.2-57.2 (West 1996); and W. Va. Code Ann. § 61-2-28 (LexisNexis 1996).

[54/] 142 Cong. Rec. S10,377, 10,377-78 (daily ed. Sept. 12, 1996) (statement of Sen. Lautenberg) ("[M]any people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies. At the end of the day, due to outdated laws or thinking, perhaps after a plea bargain, they

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Congress remedied this problem by enacting a firearm ban that remains contingent on those same prosecutors' discretionary decisions about which statute to employ. For this reason as well, the Fourth Circuit's flawed statutory construction should be rejected.

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are, at most, convicted of a misdemeanor. In fact, most of those who commit family violence are never even prosecuted."); *see also* Douglas E. Beloof & Joel Shapiro, *Let the Truth be Told: Proposed Hearsay Exceptions to Admit Domestic Violence Victims' Out of Court Statements as Substantive Evidence*, 11 Colum. J. Gender & L. 1, 3-4 (2002) (noting that victims of domestic violence refuse to cooperate with prosecutors 80–90% of the time).

CONCLUSION

For the foregoing reasons, the *Amici Curiae* respectfully request that this Court REVERSE the decision of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX

IDENTITIES AND INTEREST OF *AMICI CURIAE*

The following organizations respectfully submit this brief as *Amici Curiae* in support of Petitioner, and urge this Court to overturn the decision of the Fourth Circuit.

The **National Network to End Domestic Violence (NNEDV)** is a non-profit organization incorporated in the District of Columbia in 1995. The mission of NNEDV is to create a social, political, and economic environment in which violence against women no longer exists. A network of state domestic violence coalitions, representing over 2,000 member programs nationally, NNEDV serves as the voice of battered women and their children and those who provide direct services to them. NNEDV has a long history of working at the local, state, and national levels to promote a strong criminal justice response to domestic violence, including reducing homicides by removing firearms from convicted batterers. NNEDV was instrumental to the Congressional enactment and implementation of the Violence Against Women Acts of 1994, 2000, and 2005.

The **Domestic Violence Legal Empowerment and Appeals Project (DV LEAP)** was founded in 2003 by one of the nation's leading domestic violence lawyers and scholars. DV LEAP provides a stronger voice for justice by fighting to overturn unjust trial court outcomes on appeal, advancing legal protections for victims of domestic violence and their children through expert appellate advocacy, training law-

yers, psychologists and judges on best practices, and spearheading domestic violence litigation in the Supreme Court. DV LEAP is committed to ensuring that the Supreme Court understands the realities of domestic violence and the law in deciding domestic violence cases, and has previously co-authored three other amicus briefs to the United States Supreme Court, in *Castle Rock v. Gonzalez*; *Davis v. Washington, Hammon v. Indiana*; and *Giles v. California.* DV LEAP is a partnership of George Washington University Law School and a network of participating law firms.

The **Alabama Coalition Against Domestic Violence (ACADV)** is a nongovernmental, nonprofit organization that speaks on behalf of all Alabama domestic violence shelters and has been a leader in education, policy reform and advocacy. ACADV also operates a 24-hour statewide hotline for domestic violence. ACADV has a long history of collaboration at the state and local level. Staff and member programs work in partnership with the Alabama Legislature to pass laws that protect victims of domestic violence and hold perpetrators accountable. ACADV provides training and technical assistance to thousands of professionals around the state to promote an effective criminal justice response to domestic violence. In 2006 Alabama had over 1,600 aggravated domestic violence aggravated assaults and 31 domestic violence homicides. In 18 percent of reported domestic violence cases, a firearm was used.

The **Arizona Coalition Against Domestic Violence (AzCADV)** is a non-profit organization comprised of representatives from domestic violence programs and other concerned individuals and groups.

AzCADV is involved in many efforts to combat domestic violence, including court monitoring, sponsoring legislation and lobbying for or against bills that will impact victims, and delivering trainings and presentations on numerous topics related to domestic violence across the state of Arizona. AzCADV writes and distributes a Domestic Violence Fatality Review Report, which indicates that for the last three years, the overwhelming majority of Arizonians killed in domestic violence-related incidents were killed by a firearm. In addition, AzCADV operates the state's only legal advocacy hotline for victims, friends, family, and concerned citizens to access information and referrals.

The **Arkansas Coalition Against Domestic Violence (ACADV)** is a non-profit organization that has served both rural and urban areas of Arkansas since its inception in 1981. ACADV's mission is to eliminate personal and institutional violence against women and their children through programs providing support and safety to battered women, direct services, public information and education, systems advocacy and social change activities. ACADV's membership consists of over 60 domestic violence shelters, affiliate service providers and individuals who work toward this goal through supportive, cooperative practices in all aspects of its individual programs and collective efforts.

The mission of **Break the Cycle** is to engage, educate and empower youth to build lives and communities free from domestic and dating violence. Founded in 1996, Break the Cycle is the nation's first organization to provide law-based domestic violence services *exclusively* to young people, ages 12 to 24.

ACADV's domestic violence prevention and early intervention services include prevention education, outreach, peer leadership opportunities, and comprehensive, free legal services for young victims of abuse. Break the Cycle is a leader in the field of youth dating violence and serves as a model for communities nationwide looking to implement proactive and effective programs to deal with the issues of dating violence. Break the Cycle is a trusted resource for domestic violence information and referrals nationwide and Break the Cycle staff members regularly provide trainings for other social service agencies. Since ACADV's founding in 1996, Break the Cycle has directly served more than 103,000 youth across the nation, including protecting its clients from future harm or death by removing firearms from convicted domestic violence perpetrators.

The **California Partnership to End Domestic Violence (CPEDV)** acts as a leader and catalyst for innovative, long range plans to end domestic violence in California. CPEDV is a statewide, membership-based coalition of 195 domestic violence service providers and other supporters, who offer a united voice on legislation and budgetary initiatives affecting victims of domestic violence and their children at the local, state and national level. Over the course of its 25-year history, CPEDV has worked with lawmakers and its allied partners to enact over 100 statutes on these issues.

The **Colorado Coalition Against Domestic Violence (CCADV)** is a non-profit statewide membership organization whose mission is to end domestic violence in all its forms. CCADV was established in 1978 by twelve domestic violence service providers

in order to offer a strong statewide voice for survivors of domestic violence, their families, and providers of service and currently represents over 80 domestic violence shelters and programs, allied organizations and individuals. Through training, technical assistance and public policy advocacy, CCADV provides a system of comprehensive services that support member programs' ability to effectively serve diverse survivors of domestic violence (over 40,000 individuals each year).

CCADV recognizes the critical role that the criminal justice system plays in holding domestic violence offenders accountable and increasing victim safety. CCADV's Public Policy Program has a long history of advocating for and supporting laws and policies that affect battered women and their children, including those which reduce homicides through removal of firearms from domestic violence offenders who have Permanent Civil Protection Orders issued against them or who are convicted of crimes under Colorado's criminal code that have an underlying factual basis of domestic violence. The removal of firearms from domestic violence offenders is critical even at the misdemeanor criminal level, especially in light of research wherein 100 domestic violence homicide cases were reviewed that indicates that the most important risk factor for intimate partner femicide-suicide was prior domestic violence against the victim, with partners' access to a gun also found to be a risk factor. Furthermore, a 2006 study by Project Safeguard's Fatality Review Program (one of CCADV's member programs), which reviewed 90 domestic violence incidents involving 147 fatalities in Colorado over the period of 1996–2005, found that gunshot

was the most frequent cause of death for the victim (45.6% of victim fatalities) and the predominant cause (82.2%) of offenders' death were suicide by gunshot. In 68.9% of these cases, the victims had disclosed prior domestic violence to at least one source.

The Connecticut Coalition Against Domestic Violence (CCADV) is a membership organization made up of eighteen domestic violence programs, whose purpose is to work together to end domestic violence by changing the social conditions, beliefs and social actions that perpetuate abuse against victims of domestic violence. CCADV provides consultation and technical expertise to private and government agencies; provides information and resource materials to the media and general public; and provides extensive training to law enforcement and criminal justice personnel, health care providers, religious leaders, drug and alcohol counselors, batterer intervention service providers, and other professionals who seek justice and safety for victims of domestic violence. Through education and advocacy, CCADV supports legislation, policies and regulations that improve the quality of life for victims of domestic violence. Through its policy advocacy projects, CCADV serves as a public voice for victims of domestic violence and for those organizations that serve them.

The Delaware Coalition Against Domestic Violence (DCADV) is a statewide not-for-profit organization which was incorporated in the State of Delaware in 1994. It is DCADV's mission to work to eliminate domestic violence through training, resource provisions, and advocacy. It is DCADV's spe-

cific philosophy that all persons have the right to live without fear, abuse, oppression, and violence. To these ends, DCADV plays an instrumental role in advocating for laws and policies that positively impact the lives of battered women and their children at both the state and national levels. At the national level DCADV actively participated in efforts which resulted in the Congressional enactment and eventual implementation of the Violence Against Women Acts of 1994, 2000, and 2005. At the state level DCADV has (1) worked to expand protections for domestic violence victims and their children; (2) advocated for legislative and policy initiatives that benefit domestic violence victims and their children; and (3) engaged in continuing systems analysis in order to identify and work to eliminate factors which negatively impact victim safety.

It is an unfortunate reality that guns are too often the instrument via which perpetrators of domestic violence inflict fear, abuse oppression and violence into the lives of domestic violence victims and their children. In 2002, Delaware gained the unenviable position of being among the top 10 states in which women were murdered using firearms. In 2005, nearly one-third of all of the murders committed throughout the entire state were domestic violence murders. Of those domestic violence murders, 60% were committed with guns.

Founded in 1986 and incorporated in the District of Columbia, the **District of Columbia Coalition Against Domestic Violence (DCCADV)** is a nonprofit organization serving as the professional association for the District's anti-domestic violence service providers and is the primary representative of

battered women and their children in the public policy arena. Members of DCCADV share the goal of ending domestic violence through community education, outreach, public policy development, and services for survivors. DCCADV has, over the last 20 years, worked locally to protect the rights of survivors of domestic violence by supporting member organizations and directly assisting those suffering from the effects of domestic abuse. Two of DCCADV's primary goals are to assure that victims of domestic violence and their children are safe from harm and that programming is instituted throughout the city to prevent domestic violence. DCCADV is, therefore, extremely interested in ensuring that the laws of the District of Columbia protect both the safety and legal rights of domestic violence victims.

The **Georgia Coalition Against Domestic Violence** is a non-profit organization incorporated in the State of Georgia in 1992. The mission of GCADV is to support its member programs to achieve safety and justice for domestic violence victims. A network of local domestic violence programs, representing over 45 member programs statewide, GCADV serves as the voice of battered women and their children and those who provide direct services to them. GCADV works at the state level to promote a strong, coordinated response to domestic violence, including reducing homicides by removing firearms from convicted batterers.

The **Hawaii State Coalition Against Domestic Violence (HSCADV)** is a private, not-for-profit organization. As a statewide coalition of domestic violence programs, HSCADV's mission is to ensure the safety and protection of women in intimate rela-

tionships by coordinating domestic violence prevention and intervention services, affecting public policy, providing training and education, and establishing coordinated and consistent procedures and actions by the civil and criminal justice systems in Hawaii. HSCADV supports gun control legislation, and is especially concerned about victims of domestic violence, particularly women and children, who are killed by guns.

The **Idaho Coalition Against Sexual and Domestic Violence, Inc. (ICASDV)** is a statewide non-profit dual coalition that advocates on behalf of victims of domestic violence and sexual assault. The mission of ICASDV is to provide education, assistance, and support to individuals, programs, and organizations dedicated to ending sexual assault and domestic violence. Incorporated in 1980, ICASDV has grown to become a statewide membership network of over 55 shelter programs, counseling programs, law enforcement, victim witness units, prosecutors, and allied professionals. ICASDV has a history of working at the state and local levels and facilitates a number of working groups to promote a strong criminal justice response to domestic violence, for example, the Idaho Coordinated Response to Domestic and Sexual Violence. The research the Coordinated Response has compiled indicates that the presence of firearms within a household (more specifically, the movement of those firearms) is a strong indicator of risk within an abusive relationship. In response to the increasing number of domestic violence related fatalities in the State (in 2007 there were twenty-two—over twice the number of previous years), the Coordinated Response is currently creat-

ing a domestic violence risk assessment tool to be used by law enforcement and other criminal justice and non-criminal justice professionals around the State.

The **Illinois Coalition Against Domestic Violence (ICADV)** is a not-for-profit organization incorporated in the State of Illinois in 1978. Through the 52-member full service domestic violence agencies, ICADV is dedicated to the elimination of violence against women and their children through the following vision: to promote the eradication of domestic violence across the state of Illinois; to ensure the safety of survivors, their access to services, and their freedom of choice; to hold abusers accountable for the violence they perpetrate; and to encourage the development of victim-sensitive laws, policies and procedures across all systems that impact survivors of domestic violence.

ICADV has a long history of working to promote a strong criminal justice response to domestic violence, including reducing homicides by removing firearms from convicted batterers and from respondents to domestic violence orders of protection. ICADV was instrumental to passage of the model Illinois Domestic Violence Act of 1986 legislation and worked for enactment and implementation of the Violence Against Women Acts of 1994, 2000, and 2005.

The **Indiana Coalition Against Domestic Violence (ICADV)** is a non-profit organization incorporated in the State of Indiana. ICADV is committed to the elimination of domestic violence through: providing public awareness and education; advocating

for systemic and societal change; influencing public policy and allocation of resources; educating and strengthening coalition members; and, promoting the availability of quality comprehensive services.

The **Iowa Coalition Against Domestic Violence (ICADV)** is a non-profit organization, incorporated in the state of Iowa in 1985. ICADV provides educational and technical assistance to the domestic violence programs across Iowa, and also acts on a statewide and national level to promote public policy and legislative issues on behalf of battered women and their children. ICADV's purpose is to eliminate personal and institutional violence against women through support to programs providing safety and services to battered women and their children. ICADV recognizes that unequal power contributes to violence against women. Therefore, ICADV advocates social change, legal and judicial reform, and the end to all oppression.

Jane Doe Inc. (JDI) is the Massachusetts Coalition Against Sexual Assault and Domestic Violence. JDI is a statewide membership organization of over 60 domestic violence programs and rape crisis centers. The mission of JDI is to bring together organizations and people committed to ending domestic violence and sexual assault. JDI advocates for responsive public policy, raise awareness, and provide technical assistance and support to its member organizations that provide comprehensive prevention and intervention services. In keeping with its mission, JDI has an interest in removing barriers that limit or deny a domestic violence survivor's access to justice and support services.

The Kansas Coalition Against Sexual and Domestic Violence (KCSDV) is a non-profit organization incorporated in the state of Kansas and represents sexual and domestic violence member programs as well as the individual victims of sexual and domestic violence served by KCSDV and these member programs. KCSDV has extensive expertise on the physical, sexual, emotional and economic dangers victims and their families face. This organization and its member programs work closely with courts, legislators, law enforcement agencies, prosecutors, and other agencies across the state to provide effective networks that will protect victims of sexual and domestic violence who seek help through the enforcement of state and federal laws.

Enforcement of the laws prohibiting possession or purchase of firearms under certain circumstances related to domestic violence is an area of particular concern. KCSDV through its criminal justice project and its protection order project pays particular attention to how these federal laws are enforced in Kansas. KCSDV has provided training to advocates and allies on federal firearms provisions as they relate to domestic violence. It has also met and worked with the Office of the Governor, the Office of the Attorney General's Victims Rights Division, the Office of Judicial Administration, the Kansas Judicial Council's Family Law Advisory Committee, the Kansas Highway Patrol, as well as other law enforcement officers, judges, and attorneys on how to better implement federal firearms enforcement measures in Kansas.

The Kentucky Domestic Violence Association (KDVA) is a non-profit organization founded in

1981 and incorporated in the State of Kentucky. It is dedicated to advocating for safety and justice for battered women and their children, and provides comprehensive services to families through fifteen shelter programs located across the state. Through its hotline, shelter, legal advocacy and community outreach endeavors, KDVA has assisted battered women and their children in trying to establish their safety and stability.

Domestic violence is a serious crime with tragic consequences for millions of women and children nationwide. It is well established that the presence of firearms in domestic violence situations threaten to exacerbate an already deadly crisis. 74% of homicides in Kentucky are firearm deaths, and almost 40% of homicides occur between partners or family members. ("Violent Deaths In Kentucky 2005", Kentucky Violent Death Reporting System). There are many compelling reasons for restricting the use of availability of firearms under circumstances like those of domestic violence; such reasons form the underpinnings of the Federal gun restrictions associated with protective orders and criminal convictions. The Kentucky Legislature considered the implementation of a statute specifically addressing crimes of domestic violence assault, and enacted KRS 508.032 in 2000. However, this statute only provides for penalty enhancement, based on the relationship between victim and defendant, for a third qualifying offense. The first two assaults would be charged under the general assault statute. Therefore, the Kentucky Legislature chose not to create a specific misdemeanor crime of domestic violence/assault. A decision by this Court that would allow convicted ab-

users in Kentucky to obtain and possess firearms because the state legislature chose not to enact a specific domestic violence statute would create a grave risk of harm to victims and their children.

Legal Momentum advances the rights of women and girls by using the power of the law and creating innovative public policy. Legal Momentum advocates in the courts, Congress, and state legislatures, as well as with unions and private business, to improve the protection afforded victims of sexual and domestic violence, and is a leading authority on the rights of immigrant victims of such violence. Legal Momentum was instrumental in the enactment of the federal Violence Against Women Act and its reauthorizations. Legal Momentum views government power to restrict or ban private possession and use of firearms as an important tool that can have a significant role in protecting victims of domestic and sexual violence from lethal attacks, as well as protecting society more generally from interpersonal violence.

The Maine Coalition to End Domestic Violence (MCEDV) is a non-profit organization incorporated in 1977 in the state of Maine. The mission of MCEDV is to create and encourage a social, political, and economic environment in which domestic violence no longer exists, and to ensure that battered women are supported and that batterers are held accountable. MCEDV mobilizes and coordinates community action through a statewide network of domestic violence projects. Through these partnerships, MCEDV focuses its resources on public policy, education, and systems advocacy.

At least half of all homicides in Maine are related to domestic violence and oftentimes the weapon of choice is a firearm. From 2000 to 2007, in 34 of the 60 domestic homicides, the perpetrators used firearms to murder the victims. The 7th Report of the Maine Domestic Abuse Homicide Review Panel, distributed March 2008, notes that, "Of the fourteen perpetrators involved in the cases reviewed by the Panel, eleven killed their victims with firearms."

In an effort to hold perpetrators accountable for their actions in the criminal court system, the 2007 123rd Maine Legislature passed 5 additional laws: domestic violence assault; domestic violence criminal threatening; domestic violence terrorizing; domestic violence stalking; and domestic violence reckless conduct, which now identifies the crime as domestic violence and allows increased aggravating penalties.

The threat of batterers using firearms is a significant barrier to safety and needs to be taken seriously. Thus, MCEDV continues to support strong criminal justice responses to domestic violence, including advocating for the removal of firearms from convicted batterers in the hope of reducing homicides.

The Maryland Network Against Domestic Violence (MNADV) has been working since 1980 to eliminate domestic violence in Maryland through *education, training, and advocacy.* As Maryland's state coalition, the Network works together with local domestic violence programs as well as criminal justice and law enforcement personnel, legal advocates, health care and social service providers, clergy, educators, businesses, community groups, and

concerned individuals to *promote a coordinated community response to end domestic violence.*

The Michigan Coalition Against Domestic and Sexual Violence (MCADSV) is a non-profit organization incorporated in the State of Michigan for the purpose of providing services and advocacy on behalf of the victims of sexual assault and domestic violence. MCADSV is a membership organization of domestic violence and sexual assault service provider agencies, other supportive agencies and individuals committed to ending domestic and sexual violence in Michigan.

MCADSV is deeply concerned about the possible harm to survivors implicated by this case. Personal safety and protection from potential harm is a critical issue for victims of domestic violence that is greatly increased by the presence of a firearm. The Domestic Violence Gun Ban plays a crucial role in saving the lives of survivors and reducing the potential lethality of perpetrators.

The Missouri Coalition Against Domestic and Sexual Violence is the state's oldest and sole grassroots organization of community-based programs working to end violence against women and their children through direct services and social and systemic change. In 2006, sixty-eight percent of Missouri domestic violence homicide victims were murdered with a firearm. 18 U.S.C. § 922(g)(9) is a means of protecting women from individuals who have demonstrated a propensity for violence. As is the practice in communities throughout the country, many domestic violence offenders in Missouri plea down to non-domestic violence specific assault

charges. Lifting the federal firearm prohibition on these individuals could allow potentially dangerous offenders access to firearms. Given that Missouri does not have a parallel state statute barring those convicted of domestic violence misdemeanors from possessing firearms, the federal firearm prohibition is the only protection available to battered women in Missouri.

The **Montana Coalition Against Domestic and Sexual Violence (MCADSV)** is a not-for-profit organization incorporated in the state of Montana in 1984. Founded in 1984, MCADSV's mission is to support and facilitate networking among its member organizations while advocating for social change in Montana.

The **National Center for Victims of Crime ("National Center")**, a non-profit organization headquartered in Washington, DC, is one of the nation's leading resource and advocacy organizations for all victims of crime. The mission of the National Center is to forge a national commitment to help victims of crime rebuild their lives. The National Center is dedicated to serving individuals, families and communities harmed by crime, and works to advance laws and policies that create resources and secure rights and protections for crime victims. Through its National Crime Victims Helpline and its National Stalking Resource Center, the National Center works with victims of domestic violence who face significant and ongoing safety concerns and with the victim service providers offering front-line assistance. The National Center was a strong advocate for passage of the Violence Against Women Acts of 1994, 2000, and 2005.

The **Nevada Network Against Domestic Violence (NNADV)** was founded in 1980 to work toward the elimination of domestic and sexual violence against all persons. The NNADV works closely with advocates, judges, legislators, law enforcement officers, and prosecutors in advancing more effective criminal justice system responses to victims and domestic violence offenders. NNADV's member programs share the goal of ending domestic violence through coordinated community response efforts, community education, public policy development, and services for victims.

NNADV has a long history of working at the state and national levels to promote a strong criminal justice response to domestic violence, including reducing homicides by removing firearms from convicted batterers. NNADV was instrumental in the enactment of firearms legislation in the last Nevada Legislative session which provides courts with the ability to remove firearms during the tenancy of a protective order (NRS 33.031).

The **New Hampshire Coalition Against Domestic and Sexual Violence (NHCADSV)** is a statewide network of independent member programs committed to ending domestic and sexual violence. The mission of NHCADSV is to ensure that quality services are provided to victims/survivors of domestic and sexual violence; prevent future violence by educating the public; influence public policy; and encourage the provision of quality services and accountability for perpetrators.

From 1990 through 2005, a total of 320 homicides occurred in New Hampshire; 48% were domes-

tic violence-related. Of these domestic violence-related homicides, 74 (23%) were committed by the use of a gun.

The New Jersey Coalition for Battered Women (NJCBW) is a statewide coalition of domestic violence service programs and concerned individuals whose purpose and mission is to end violence in the lives of women. Incorporated in 1979, NJCBW is a private, non-profit corporation whose members include 28 domestic violence programs in the State of New Jersey.

NJCBW is extremely concerned about the use of firearms in domestic violence situations especially given the number of intimate partner deaths involving firearms. From 2003 until 2005, 40% of intimate partner and associated deaths in New Jersey were perpetrated with the use of a firearm. Hence, NJCBW supports any efforts to implement weapon laws and policies which will protect domestic violence victims in New Jersey as well as in other states.

The New Mexico Coalition Against Domestic Violence (NMCADV) is a not-for-profit organization which was incorporated in the state of New Mexico in 1981. The mission of NMCADV is to improve the response to domestic violence in New Mexico; it accomplishes this by advocating for positive social change at all levels and by providing support and resources to members of its coalition. Along with its mission is the ultimate vision of social justice and the goal to end violence against women through partnerships, advocacy and direct services. NMCADV also plays an instrumental role in advo-

cating for laws and policies, locally and nationally, that affect battered women and their children.

The New York State Coalition Against Domestic Violence (NYSCADV) is a non-profit organization incorporated in New York State in 1978. The NYSCADV is a statewide membership organization whose mission is to *prevent and eliminate domestic violence* through the promotion of victim safety, offender accountability and the broad social change necessary to confront oppression of every kind. The NYSCADV is a coalition of over 100 local domestic violence programs which provide direct services to victims and their children. Together, these programs work to promote a strong criminal justice response, including reducing homicides by removing firearms from convicted batterers.

The North Carolina Coalition Against Domestic Violence (NCCADV) is a not-for-profit organization incorporated in the state of North Carolina in 1981. The mission of NCCADV is to create social change through the elimination of the institutional, cultural, and individual oppressions that contribute to domestic violence. NCCADV represents a network of more than 90 local domestic violence service providers and serves as the voice of battered women and their children and those who provide direct services to them.

NCCADV has a long history of working at the local, state, and national levels to promote a strong criminal justice response to domestic violence, including reducing homicides by removing firearms from convicted batterers. NCCADV has been collecting information on domestic violence homicides in its

state since 2002. The majority of homicides are committed with firearms each year. NCCADV member organizations have been involved in the reform of state laws addressing domestic violence for more than two decades. Along with local, state, and national leaders in domestic violence and criminal justice issues, NCCADV continues to formulate new approaches and innovative legal solutions to ending domestic violence. North Carolina does not have specific domestic violence crimes which require a relationship status in the prosecution of these crimes.

The **North Dakota Council on Abused Women's Services/Coalition Against Sexual Assault in North Dakota (NDCAWS/CASAND)** is a not-for-profit organization incorporated in the state of North Dakota in 1978. The mission of NDCAWS/CASAND is to provide leadership and support in the identification, intervention, and prevention of domestic and sexual violence. NDCAWS/CASAND is approaching a 30-year anniversary as a Coalition, growing from a loose network of five organizations to a membership of 21 direct service agencies. The history of the organization includes not only the nurturing and subsequent growth of a direct service provider network but also a consistent presence in the legislative and policy work advocating for victims' rights and supports in a variety of systems. The coalition has been active in this role since the first state protection order statute was passed in 1979.

NDCAWS/CASAND continues to facilitate and enhance work on a statewide basis with law enforcement and other criminal justice personnel to address victim and officer safety and offender ac-

countability specifically by implementing a model law enforcement domestic violence policy, incorporating new statutory predominant aggressor and self defense language in response protocols, and offering multidisciplinary training relating to firearms and domestic violence.

The **Ohio Domestic Violence Network (ODVN)** is a non-profit organization incorporated in the state of Ohio in 1988. ODVN advances the principle that all people have the right to an oppression- and violence-free life. ODVN fosters changes in its economic, social and political systems and brings leadership, expertise and best practices to community programs. ODVN is a coalition of local domestic violence agencies, allied organizations and concerned individuals representing over 200 members statewide. ODVN serves as the voice of victims of domestic violence and their children and those who provide direct services to them. ODVN has a long history of working at the local, state and national levels to promote a strong criminal justice response to domestic violence, including reducing homicides by removing firearms from convicted batterers. ODVN was engaged in the Congressional enactment and implementation of the Violence Against Women Acts of 1994, 2000, and 2005.

The **Oklahoma Coalition Against Domestic Violence and Sexual Assault (OCADVSA)** is the professional membership organization of Oklahoma based domestic violence and sexual assault victim service providers. Membership includes 28 state certified and 3 tribal programs. Since 1981 the OCADVSA has been the advocacy leader in representing the critical needs of survivors of domes-

tic violence and sexual assault, and more recently stalking and dating violence in Oklahoma. OCADVSA provides training to professionals, technical assistance to service providers, advocate for legislative change, and promote public awareness of domestic violence, sexual assault, stalking and dating violence. OCADVSA is responsible for development and maintenance of the state domestic and sexual violence data collection systems, houses a comprehensive clearinghouse and library, maintains a domestic violence and sexual assault web-sits, provides support to victim service providers and limited legal support to service provides and clients they serve.

Oklahoma law provides specific statutes for the prosecution of domestic abuse and related crimes. While Oklahoma is generally a very pro-gun ownership state, including many members of the Coalitions, it is clear from practice and the experience of those member programs that guns do not need to be in the hands of domestic violence perpetrators. The Oklahoma Domestic Violence Fatality Review Board reported in its 2007 Annual Report that 53% of the domestic homicides in Oklahoma were committed with a firearm. Most of those homicides were committed by persons who had not encountered the criminal justice system related to domestic violence or they or their victims utilized the services of Oklahoma domestic violence programs. Strong criminal justice systems response and not allowing domestic abuse perpetrators to possess firearms, reduces domestic violence homicide and saves lives in Oklahoma.

The Pennsylvania Coalition Against Domestic Violence (PCADV) is a private non-profit organization that provides services and advocacy on behalf of victims of domestic violence and their children. The first domestic violence coalition in the nation, PCADV is a membership organization of 61 programs offering shelters, hotlines, counseling programs, legal and medical advocacy projects, and transitional housing projects for victims of abuse and their children. For more than thirty years, PCADV has provided training and technical assistance to domestic violence programs, private and government agencies, policy-makers, attorneys, the courts, law enforcement and criminal justice personnel, health care providers, the media, and the general public on issues of domestic violence.

PCADV has an over 30-year history of working on the local, state and national levels to promote a strong criminal justice response to domestic violence, including the reduction of homicides by removing firearms from the possession of convicted batterers. Further, PCADV has adopted a policy position that states:

> Consistent with both our mission to end domestic violence, and the fact that firearms too often turn domestic violence into domestic homicide, the Pennsylvania Coalition Against Domestic Violence supports gun violence prevention legislation and opposes efforts to encourage domestic violence victims to obtain guns.

Pennsylvania does not have a statutory crime of domestic violence. If the Supreme Court should determine that the federal Domestic Violence Gun Ban does not apply to those perpetrators of domestic violence who have not been convicted of a domestic violence-specific misdemeanor, these perpetrators would be able to keep or purchase new weapons. In 2006, there were 127 deaths from domestic violence incidents in Pennsylvania. Fifty of those deaths involved a firearm. Given the high association of firearms to domestic violence homicide, such an outcome would place Pennsylvania's victims of domestic violence in considerably increased danger of harm.

The **Rhode Island Coalition Against Domestic Violence (RICADV)** is a not-for-profit organization incorporated in the State of Rhode Island in 1979 with a vision of ending domestic violence. The mission of RICADV is to support its member agencies and to provide leadership on the issue of domestic violence. RICADV's member agencies consist of the Blackstone Valley Advocacy Center, the Domestic Violence Resource Center of South County, the Elizabeth Buffum Chace Center, Sojourner House, the Women's Center of Rhode Island, and the Women's Resource Center of Newport & Bristol Counties. Together, these agencies provide services to over 10,000 victims of domestic abuse each year.

RICADV has a long history of working at the state, local, and national level to promote a strong criminal justice response to domestic violence. RICADV works with states and local communities to implement best practices in the prosecution of domestic violence cases. Its member organizations provide training for law enforcement officers and

prosecutors about domestic violence and the needs of victims. In addition, its member organizations have been involved in the reform of state laws addressing domestic violence for nearly thirty years. Along with local, state and national leaders in domestic violence and criminal justice issues, RICADV continues to formulate new approaches and innovative legal solutions to ending domestic violence. The RICADV has worked for many years to protect victims of abuse from gun violence, as it has seen too often the impact that domestic violence mixed with firearms can have. In 2005 RICADV worked to successfully see passage of the "homicide prevention legislation" in Rhode Island, which bars individuals who have permanent protective orders from having access to firearms. RICADV is currently involved in coordinating a statewide Firearms Task Force for Domestic Violence, to address issues regarding implementation of this legislation.

The **South Carolina Coalition Against Domestic Violence and Sexual Assault (SCCADVASA)** is a non-profit organization, incorporated in the state of South Carolina in 1983. The mission of SCCADVASA is to create a social, political and economic environment in which violence against women no longer exists. A network of domestic violence and sexual assault organizations, representing 23 member programs statewide, SCCADVASA serves as the voice for battered women and their children and victims of rape and those who provide services to them. SCCADVASA has a long history of working at the local, state and national level to promote a multidisciplinary response to domestic violence and sexual assault. SCCADVASA

has been a key player in all legislation addressing domestic violence and sexual assault since its inception.

The **South Dakota Coalition Against Domestic Violence and Sexual Assault** (SDCADVSA) is dedicated to the reclamation of the respected, autonomous and safe status of women who have experienced battering and/or sexual violence and their children and therefore is committed to the elimination of personal and societal violence in the lives of women and their children.

The SDCADVSA believes violence against women and their children results from the use of force or threat to achieve and maintain control over others in intimate relationships and societal abuses of power and domination in the forms of sexism, racism, homophobia, classism, anti-Semitism, ablebodyism, ageism, and other oppressions. The SDCADVSA recognizes the abuse of power in society fosters battering and rape by perpetuating conditions that condone violence. Therefore, it is the mission of SDCADVSA to work for the major societal changes necessary to eliminate all forms of oppression, particularly those aimed at women and their children.

It is the mission of the **Tennessee Coalition Against Domestic and Sexual Violence (the Coalition)** to end domestic and sexual violence in the lives of Tennesseans and to change societal attitudes and institutions which promote and condone violence through public policy advocacy, education, and activities which increase the capacity of programs and communities to address such violence.

The Coalition is the statewide network of domestic violence shelters, sexual assault centers, programs, and individuals working in coalition to promote domestic violence and sexual assault intervention and prevention in Tennessee. The work of the Coalition includes the dissemination of information and resources, systems advocacy, training and technical assistance, statewide planning, public awareness/community education, administration, and coalition building. During its 25-year history, it has worked to expand the number of domestic violence and sexual assault programs from five to 49, which together serve more than 60,000 victims annually.

The Coalition has a demonstrated history of advocating for survivor safety and batterer accountability, including reducing homicides by removing firearms from convicted batterers. The Coalition was instrumental in providing training on Federal Firearms provisions and enforcement.

The **Utah Domestic Violence Council (UDVC)** is a non-profit organization incorporated in the State of Utah in 1993. The mission of UDVC is to create a State where domestic violence is intolerable. UDVC represents a multidisciplinary membership of 16 domestic violence shelters, over 31 victim advocate programs and 22 local domestic violence coalitions as well as survivors, government entities, business leaders, health care providers, legal services, prosecutors and law enforcement. UDVC provides a voice on behalf of battered women and their children and those who provide direct services to them. UDVC has a long history of collaboration at the local and state levels to strengthen the criminal

justice response to domestic violence including reducing homicides by removing firearms from convicted batterers.

The **Vermont Network Against Domestic and Sexual Violence (the VT Network)** is a nonprofit organization incorporated in the State of Vermont in 1986. The mission of the VT Network is to eradicate domestic and sexual violence through advocacy, education and social change. The VT Network is comprised of sixteen member domestic and sexual violence programs who serve nearly 20,000 victims and survivors from across the state each year. The VT Network serves as the voice of Vermont's battered women and their children and those who provide direct services to them. In Vermont, domestic violence is the most frequent cause of homicide, and guns are used in a majority of those murders. While the Vermont General Assembly has created laws specific to the crime of domestic violence, they have not created laws that restrict access to firearms by known perpetrators of domestic violence beyond the federal statute.

The **Virginia Sexual and Domestic Violence Action Alliance (the Action Alliance)**, the nonprofit state domestic and sexual violence coalition in Virginia, was incorporated in the Commonwealth of Virginia in 2004 after the merger of Virginians Aligned Against Sexual Assault (VAASA, incorporated 1980) and Virginians Against Domestic Violence (VADV, incorporated 1981). The Action Alliance is a coalition of individuals, agencies and organizations committed to the elimination of sexual and domestic violence. The Action Alliance is a diverse group of individuals and organizations that be-

lieve that *all* people have the right to a life free of violence. The Action Alliance recognizes that sexual and domestic violence are linked to other forms of oppression, which disproportionately affect women, children, and other marginalized people, harming individuals, families and societies as a whole. The Action Alliance will use its diverse and collective voice to create a Virginia free from sexual and domestic violence—inspiring others to join and support values of equality, respect and shared power.

The Action Alliance strongly supports the federal and state laws that deny access to firearms for perpetrators of family abuse. While in Virginia there is a specific charge of "family abuse," the Action Alliance believes that regardless of the actual charge, if the crime is committed against a "family or household member" or similar person, the same firearm prohibitions/ restrictions should apply.

A 2007 report by the Virginia Office of the Chief Medical Examiner found that in over 53% of family and intimate partner homicides in Virginia in 2005 a firearm was used. When considering just intimate partner homicides, that percentage rose to just fewer than 60%.

The Virgin Islands Domestic Violence and Sexual Assault Council (DVSAC) is a non-profit organization incorporated in the Territory of the United States Virgin Islands in 1998. The mission of DVSAC is to coordinate education, prevention and response efforts in order to reduce the incidence of domestic violence, sexual assault, stalking and dating violence and to make these crimes socially and culturally unacceptable. DVSAC is the state domes-

tic violence and sexual assault coalition with 14 agency partners and 64 members. DVSAC has a history of working at the local level to promote a strong criminal justice response to domestic violence. This has included the formation of the Virgin Islands Firearms Task Force in response to overwhelming numbers of adult domestic violence firearms homicides in the Territory since June 2005.

The Washington State Coalition Against Domestic Violence (WSCADV) is a non-profit organization, incorporated in the state of Washington. Founded in 1990 by domestic violence survivors, WSCADV is a statewide membership organization that organized to share resources, develop common strategies, and strengthen community responses to domestic violence in Washington State. WSCADV's core commitment of the WSCADV is to support domestic violence survivors, and emergency shelter and advocacy programs by advocating for laws and public policies that promote safety and justice for domestic violence victims.

WSCADV is committed to achieving a criminal legal system response to domestic violence that provides meaningful protection to victims of domestic violence.

In Washington State, abusers used firearms to kill over half of the victims in domestic violence homicides. According to the Washington State Domestic Violence Fatality Review, since 1997, over 200 domestic violence homicides in Washington were caused by firearms. Notwithstanding the high correlation between domestic violence homicides and firearm possession, overturning the federal Domestic

Violence Gun Ban in cases where a domestic relationship has not been alleged would provide domestic violence abusers access to lethal weapons in highly dangerous situations. In Washington State, most domestic violence cases are charged as misdemeanor assaults, as Washington has not adopted a specific domestic violence assault statute.

Incorporated in 1981, the **West Virginia Coalition Against Domestic Violence (WVCADV)** is a statewide, non-profit organization dedicated to the elimination of domestic violence and to the transformation of social systems that support non-violence, accountability, and economic self-sufficiency in diverse family structures and intimate relationships. To achieve this end, the Coalition Statewide Office (the Coalition) coordinates efforts in public policy, legislative advocacy, resource development, public information, training programs, and collection and storage of aggregate data from member programs. The Coalition prioritizes raising public awareness regarding the devastating social, economic, cultural, personal, and spiritual impact of domestic violence; and works collaboratively at local, state, and national levels.

The Coalition's fourteen member programs provide direct services to victims and operate outreach offices throughout the state. Direct service providers respond to the needs of victims on a 24-hour basis by providing the following services: safe emergency housing, case management, peer counseling and group support, information and referral, advocacy, and victims rights information. Each program's service area varies from two to eight counties and provides direct services through residential and out-

reach centers. The Coalition and member programs work together to develop a strong network of shared resources and support.

Firearms and domestic violence are a deadly combination. Abusers who gain access to firearms pose a lethal threat both to those they have abused and to the wider community. Firearms are the weapons of choice among abusers who kill their intimate partners and children. Multiple studies have found that intimate partners are more likely to be murdered with a firearm than by all other means combined. In 2005, there were 12 domestic violence homicides in West Virginia. A firearm was used in 66% of the homicides. In a study conducted by Marshall University, researchers found that 51.4% of domestic violence victims believed that their abuser would use a firearm on them. Guns were also present during the abuse in 61% of police reports filed.

The Coalition has a clear interest in U.S. Supreme Court decisions regarding firearms and domestic violence. The safety of victims of domestic violence, their families, and their communities is at stake.

The Wisconsin Coalition Against Domestic Violence (WCADV) is a not-for-profit membership organization of battered women, formerly battered women, domestic abuse programs, and all committed to ending domestic violence. Founded in 1978 and incorporated in Wisconsin, WCADV's mission is to end violence against women through partnerships, advocacy and direct services. WCADV plays an instrumental role in advocating for laws and policies that affect battered women and their children, such

as the Violence Against Women Acts of 1994, 2000, and 2005. In recent years, WCADV helped lead a coalition of organizations that successfully prevented state legislation from passing that would have allowed individuals to carry concealed guns. WCADV has also been heavily involved in efforts to ensure even implementation and enforcement of federal firearms policy at the state and local level.

In Wisconsin between 2000 and 2005, 118 people were murdered with guns in domestic violence related homicides. This is more than those killed by knives, other weapons, beating, strangulation, and other methods of killing combined (99). WCADV is very concerned that any weakening of the federal ban on guns for perpetrators of domestic violence will result in an even greater number of tragic deaths.

The Wyoming Coalition Against Domestic Violence and Sexual Assault (WCADVSA) is a non-profit organization incorporated in the State of Wyoming. The mission of WCADVSA is to create a social, political, and economic environment in which sexual and domestic violence against women no longer exists. The WCADVSA is a network of local sexual assault and domestic violence coalitions that serves as the voice of battered women and their children and those who provide direct services to them. WCADVSA has a long history of working at the local and state level and with national organizations at the national level to promote a strong criminal justice response to domestic violence, including reducing homicides by removing firearms from convicted batterers.

AMICUS CURIAE BRIEF

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(6)

No. 07-608

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In the Supreme Court of the United States

UNITED STATES,
Petitioner,

v.

RANDY EDWARD HAYES,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

Brief of Professors of Linguistics and Cognitive Science as Amici Curiae in Support of Neither Party

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Interest of Amici Curiae[1]

Amici Georgia M. Green, PhD.; Ray Jackendoff, PhD.; Jeffrey P. Kaplan, PhD.; and Roger W. Shuy, PhD. are professors of linguistics (the study of language), and amicus Edward Gibson, PhD. is a professor of cognitive science who specializes in psycholinguistics (the study of the mental processes involved in understanding, producing, and learning language). Their credentials are summarized in Appendix A.

In cases such as this one that involve the interpretation of language, linguistics can offer insights different from those provided by usual modes of legal argument. We believe that those insights will be useful here, because the seemingly unremarkable issue of statutory interpretation presented in this case raises some quite substantial issues about how language works, how language is used and understood, and how best to go about the process of interpreting language.

We take no position on the *legal* question before the Court. Instead, we focus solely on questions relating to the ordinary meaning of the statutory language, by which we mean the way that an ordinary native speaker of English would be likely to understand the statute. In other words, we are dealing with "the language as we normally speak it."[2]

This Court has often said that statutory interpretation begins with the statute's text and that the

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1. No party's counsel authored this brief in whole or in part. No monetary contribution intended to fund the preparation or submission of this brief was made by any party or any party's counsel. Nobody other than amici or their counsel has made any such contribution. Letters evidencing the parties' consent to the filing of this brief have been lodged with the Clerk.

2. *Watson v. United States*, 128 S. Ct. 579, 583 (2007).

text should ordinarily be interpreted according to its ordinary meaning.[3] The task of figuring out ordinary meaning is important for several reasons. If the court thinks the statute's meaning is plain, analyzing the text may be not just the beginning of the interpretive process but also the end. And even if the statute is unclear or ambiguous, focusing on ordinary meaning before turning to issues of *legal* interpretation—canons of interpretation, statutory context, congressional purpose, legislative history—is important because it bears on the range of meanings that the statute can reasonably support. Attending to ordinary meaning can also help to ground the process in a degree of objectivity, because ordinary meaning is, or at least ought to be, unaffected by individual judges' personal preferences and interpretive philosophy.

Even though interpreting written texts is central to the legal process, legal education typically pays little or no attention to how language works or to methodologies for analyzing disputes about language, the assumption apparently being that by the time people reach law school, they already have the necessary knowledge and skill. Because using and understanding language seems as natural as breathing, we take language for granted, and most of us do not realize that what we were taught in high school merely scratches the surface.

We believe that the interpretive toolkit used by lawyers and judges should be more sophisticated than the one used by high school students. And we believe that the insights and methodologies of linguistics can provide analytical tools, as well as a fresh perspective,

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3. *E.g.*, *BP America Production Co. v. Burton*, 127 S. Ct. 638, 643 (2006).

that can help in resolving interpretive problems like the one presented here.

This case provides a good opportunity to demonstrate this, because although it may at first seem to present only a garden-variety question of statutory interpretation, upon examination it raises a surprising number of language-related issues, ranging from the use and misuse of dictionaries to the structure of concepts and from punctuation and paragraphing to the process by which language is understood.

Introduction and Summary of Argument

The dispute here is about the definition of a misdemeanor crime of domestic violence (MCDV). Under the Fourth Circuit's interpretation, the relative clause *committed by a current or former spouse, parent, or guardian of the victim,* etc. modifies the phrase that immediately precedes it: *the use or attempted use of physical force, or the threatened use of a deadly weapon*, as shown here:

> [T]he term "misdemeanor crime of domestic violence" means an offense that—
>
> (i) is a misdemeanor under Federal or State law; and
>
> (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim.

The government, on the other hand, along with most of the other circuits, interprets the *committed by* clause as modifying *an offense*:

> [T]he term "misdemeanor crime of domestic violence" means an offense that—
>
> (i) is a misdemeanor under Federal or State law; and
>
> (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim.

Two arguments have been advanced in support of this interpretation. One is that the verb *commit* can't combine with the noun phrase *the use of force* to form a verb phrase such as *commit a use of force* or *the use of force committed by a current or former spouse, parent, or guardian of the victim*. The other relies on the fact that the definition uses the word *element* in the singular. According to this theory, the phrase *the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim* sets out two separate elements rather than just one.

Both of those arguments are at odds with what is known about language and how it works.

The argument that one can't say *a use of force committed by* [*someone*] is apparently based on nothing more than an intuition that that phrase sounds weird. While we understand the intuition and even share it to a degree, it is not a reliable guide here, because it doesn't square with the evidence of how English is actually used. Weird-sounding or not, such constructions are an attested part of the English language.

The singular-element argument, too, is mistaken. As a matter of ordinary language, there is no reason to think that an element of a crime cannot include more than one concept. Indeed, the evidence of actual usage

suggests that an element of a crime is understood as something that *can* be made up of more than one concept. That understanding is reflected in the fact that 18 IC. § 16(a) defines a "crime of violence" as a felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." This definition treats the phrase *the use, attempted use, or threatened use of physical force against the person or property of another* as denoting a single element even though (as the government concedes) the phrase expresses more than one concept. The government argues that in the definition of a crime of violence, the two concepts are necessarily interrelated but that in the definition of an MCDV they are not. But that claim does not stand up to examination. As we will show, the grammatical and conceptual structures of the two definitions are functionally the same, so the degree of relatedness is the same in both cases.

Thus, the Fourth Circuit's interpretation is a reasonable one, which means that the government's interpretation does not represent the statute's plain meaning. The question of which interpretation represents the more natural reading (i.e., which one an ordinary reader would be more likely to arrive at) is an empirical one, and since we have not tried to find out the answer empirically, we do not make any predictions. We do, however, discuss various factors that can be expected to play a role in how the statutory language would be understood.

Argument

A. The grammar of English permits an interpretation in which the *committed-by* clause modifies *the use or attempted use of physical force, or threatened use of a deadly weapon.*

The government challenges the Fourth Circuit's reading of the MCDV statute on the ground that English as it is ordinarily used does not permit the verb *commit* to combine with a noun phrase such as *the use of force* to form a verb phrase such as *the use of force committed by* [*someone*]. This argument originated in the D.C. Circuit's decision in *United States v. Barnes*, which represents perhaps the most detailed attempt to justify the interpretation that the government advances.[4] The court in *Barnes* quoted from the dictionary definition of *commit* and then went on to say, "The use of force is not 'committed,' 'done,' or 'perpetrated.' An '*offense*' is 'committed' or 'perpetrated.'"[5] The government now makes essentially the same argument.

This argument rests on a factual assumption about how the verb *commit* behaves in actual use. And that assumption's validity can be tested: if people really do use phrases such as *the use of force committed by* [*someone*] or [*someone*] *committed a use of force*, the assumption is invalid. As recently as 30 years ago, looking for examples of such phrases in actual use would have been a daunting task. But now, with tools such as Google and Westlaw, it can be done in a matter of minutes.

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4. *United States v. Barnes*, 295 F.3d 1354 (D.C. Cir. 2002).

5. *Barnes*, 295 F.3d at 1360 (emphasis by the court; footnote omitted).

When those tools are brought to bear here, they show that people—including representatives of the Department of Justice and the members of this Court—do use constructions of the kind that the D.C. Circuit described as impossible and government describes as abnormal:

From an FBI publication:

> International terrorism is the unlawful use of force or violence committed by a group or individual, who has some connection to a foreign power or whose activities transcend national boundaries, against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives.[6]

From a statute:

> Domestic abuse battery is the intentional use of force or violence committed by one household member upon the person of another household member without the consent of the victim.[7]

From a newspaper article:

> Mitchell claims Schaffer beat and sprayed him because he is black . . . .That constitutes an unnecessary use of force committed with malice and ill will, Mitchell states in the suit.[8]

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6. Federal Bureau of Investigation, *Terrorism in the United States 1996* at 3 (1996) (available at <http://www.fbi.gov/publications.htm> (accessed June 12, 2008)).

7. La. Rev. Stat. Ann. § 14:35.3.A.

8. *Inmate's Lawsuit Alleges Deputies Beat, Stabbed Him*, SARASOTA (FLORIDA) HERALD TRIBUNE (April 9, 1998) (available on Westlaw at 1998 WLNR 1754304).

From a judicial decision:

> Plaintiff Jimenez maintains that Defendant Herrera caused criminal proceedings to be commenced against him without probable cause to believe that he had committed the crime of aggravated assault and that "Herrera had done so to cover up the illegal use of excessive force committed by Herrera."[9]

Additional examples are set out in Appendix B.

This Court used a similar formulation in *Aro Manufacturing Co. v. Convertible Top Replacement Co.*:

> We therefore find it necessary to consider whether payment by Ford to AB constituted full payment for the infringing use committed directly by Ford's purchasers and indirectly by Aro.[10]

Of course, merely finding examples of a construction in the real world doesn't necessarily show that the construction is grammatical; Google finds about 700 web pages with the phrase *he wented* (compared with more than 35 million for *he went*). But the examples above and the others like them can't be brushed aside as mere aberrations. They are written in a more or less formal style and they come from texts that are likely to have been composed and edited carefully. There is no indication that the authors were engaging in wordplay or intentionally using an incorrect form for effect.

Constructions like *commit a use of force* fit into the pattern of words and phrases that can co-occur with *commit*, either as direct objects in active-voice constructions or as subjects in passive constructions. (We

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9. *Jimenez v. Herrera*, 1996 WL 99715 at *3 (N.D. Ill. 1996)

10. 377 U.S. 476, 503 (1964).

will refer to subjects and objects together as "complements."[11]) When *commit* is used with regard to an action, the words that prototypically serve as its complement all denote bad acts: *a crime, a murder, robbery, perjury*. Phrases such as *the use of physical force* fall into that category. Of course, such a phrase differs from *a crime* and *a murder* in that it is a more complex structure. But that doesn't matter. The phrases *an act of force* and *an act of violence* have the same structure, and constructions like *commit an act of force* or *commit an act of violence* are perfectly fine.[12]

Nothing we have said is inconsistent with the dictionary definitions that the government cites.[13] Those definitions simply do not address the question whether there are limits on the types of noun-phrase structures that will work as complements of *commit*. General-purpose dictionaries—even the monumental *Oxford English Dictionary*—capture only a fraction of the information that bears on the meaning and use of words.[14] They don't try to catalogue the patterns of usage associated with a particular word, such as the grammatical patterns that it can and cannot occur in (referred to variously as valency, colligation, and subcategorization), the other words it can and cannot be associated with (selectional restrictions), the words that it tends to co-occur with (collocations), and the sorts of

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11. *See* Rodney Huddleston & Geoffrey Pullum, THE CAMBRIDGE GRAMMAR OF THE ENGLISH LANGUAGE 215–28 (2002).

12. For examples of usages involving *act of force*, see Appendix C. And a Google search indicates that usages involving *act of violence* appear on more than 160,000 web pages.

13. Gov't Br. 15.

14. *E.g.*, Jean Aitchison, WORDS IN THE MIND 13–14 (1994).

meanings that it is related to (semantic associations).[15] Given the important role that dictionaries often play in the process of interpreting statutes, courts ought not rely on dictionaries to resolve issues that the dictionaries don't deal with.

This is not to deny that *the use of force committed by* [*someone*] sounds a little strange. But that doesn't mean that it is ungrammatical or abnormal. Intuitions of this sort are not always reliable; odd-sounding constructions may nevertheless be grammatical and may be more widely used than we think. Most of us are unaware of the degree to which people can differ in their judgments about grammaticality; what one person sees as an error someone else may see as an acceptable variant.[16] It is therefore all too easy to equate "unfamiliar" with "wrong." And grammaticality judgments don't necessarily involve yes-or-no decisions, but can vary by degrees across a range.[17]

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15. *E.g.*, Michael Hoey, *What's in a Word?*, MED MAGAZINE No. 10, <http://www.macmillandictionary.com/MED-Magazine/August 2003/10-Feature-Whats-in-a-word.htm> (Aug. 2003; accessed June 12, 2008); Beth Levin, *Building a Lexicon: The Contribution of Linguistics*, 4 INT'L J. OF LEXICOGRAPHY 205 (1981).

16. This issue is discussed in a series of blog posts on Language Log, the most recent one (which links to the others) being Arnold Zwicky, *The thin line between error and mere variation 5: better getter*, LANGUAGE LOG, <http://languagelog.ldc.upenn .edu/nll/?p=92> (May 3, 2008; accessed June 12, 2008).

17. *See, e.g.*, Sam Featherston, *Thermometer judgements as linguistic evidence*, *in* Claudia Maria Riehl & Astrid Rothe (eds.), WAS IST LINGUISTISCHE EVIDENZ? KOLLOQUIUM DES ZENTRUMS "SPRACHENVIELFALT UND MEHRSPRACHIGKEIT," (Nov. 2006) (available at <http://www.sfb441.uni-tuebingen.de/~sam/pap ers/Koeln06paper.pdf> (accessed June 12, 2008)).

The risks inherent in relying only on grammatical intuitions are heightened by the fact that when questions of grammar or usage arise in the course of interpreting a statute, they will usually be intertwined with value-laden issues of policy and of justice between the parties. Moreover, the judge will be conscious of how the resolution of the linguistic issue will affect the outcome of the case. This is a decisionmaking environment almost tailor-made to maximize the effects of confirmation bias—the natural tendency to view things in a way that is consistent with one's preexisting attitudes and predispositions.[18]

What all this suggests is that where evidence of actual usage is only a Google search away, it will often make sense to consult it rather than simply assume that one's intuitive judgments about grammaticality are valid. For example, this sort of reality check may be in order when one cannot articulate a reason for one's belief that a particular construction is ungrammatical. As evidenced by the expression that an opinion "won't write," an inability to satisfactorily explain a conclusion may be a warning sign that the conclusion itself needs to be reexamined.[19]

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18. *See generally* Raymond S. Nickerson, *Confirmation Bias: a Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCH. 175 (1998).

19. *See, e.g.*, Chad Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 GEO. L.J. 1283, 1303, 1318 (2008). However, we do not mean to suggest that introspective judgments about linguistic acceptability can never be trusted. Some grammatical judgments are simple, such as the fact that the phrase *an element* is singular.

    Moreover, some qualifications are in order. First, while Google, Westlaw, and Lexis can be powerful tools when one is looking for examples of particular words or phrases, they are less

B. The Fourth Circuit's interpretation is consistent with the MCDV statute's use of the word *element* in the singular.

The government argues, and most courts have held, that the phrase *committed by* [*a current or former spouse, parent, or guardian of the victim*] cannot be interpreted as modifying *the use of physical force* because the definition of an MCDV says "has an element[,]" not "has as elements[.]" According to this argument, a phrase such as *the use of physical force committed by* [*a current or former spouse, parent, or guardian of the victim*] cannot be regarded as a single element because it combines two separate concepts: first, the use of physical force, and second, the relationship between the assailant and the victim. These concepts are variously described by the courts that have ruled for the government as "two conceptually distinct attributes[,]"[20] "two very different things[,]"[21] and "two independent, and unlinked, factors[.]"[22]

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useful in looking for examples of a particular grammatical structure or pattern. Second, the mere fact that a search finds no examples of a particular construction does not mean that the construction is grammatically unacceptable. One of the defining characteristics of language is that it is possible to say things that have never been said before. So although the volume of text that Google can search is staggering, it includes only a small fraction of the number of grammatically acceptable sentences that could possibly be written. It is therefore to be expected that there will be grammatically acceptable constructions of which no prior examples can be found.

20. *E.g.*, *United States v. Meade*, 175 F.3d 215, 218 (1st Cir. 1999).

21. *United States v. Hayes*, 482 F.3d 749, 761 (4th Cir. 2007) (dissenting opinion).

22. *Barnes*, 295 F.3d at 1363.

Although other statutes use *an element* to refer to multi-part concepts—for example, a "crime of violence" is defined by 18 IC. § 16(a) as an offense that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another"—these statutes are said to be distinguishable. The D.C. Circuit, for instance, described the definition of a crime of violence as involving "a necessarily two-pronged single 'element,' namely (1) use of force (2) against another's person or property," whereas the definition of an MCDV supposedly involves merely a combination of "two independent, and unlinked, factors, the use of force and the perpetrator's relationship to the victim."[23]

This theory holds (1) that an element may include only one concept, (2) except if it is "necessarily two-pronged," but (3) that category does not include *the use of physical force committed by a current or former spouse, parent, or guardian of the victim*. As a matter of ordinary language, this theory has little to recommend it.

1. We start with the assumption that a legal element cannot incorporate more than one concept or "distinct attribute,"[24] which , in turn, assumes that one can easily determine what constitutes a single concept or attribute. Both assumptions, we believe, are unjustified.

First, there is no reason to think that indivisibility is an inherent characteristic of a legal element, because there is no reason to think that a legal element *has* any

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23. *Id.* at 1364.

24. Once again, dictionary definitions provide no help. Black's defines *elements of crime* merely as "[t]he constituent parts of a crime . . . that the prosecution must prove to sustain a conviction[.]" BLACK'S LAW DICTIONARY 539 (8th ed. 2004).

inherent characteristics. Unlike a chemical element, a legal element is not something real that exists in the world. It has no physical dimensions or attributes that can be observed, measured, or counted. It is not something real but intangible, such as an emotion. Nor is it even abstraction, such as the principles of mathematics, that might be said to exist independent of human thought. Rather, it is an intellectual construct: a mental framework around which we organize our construal of reality. More particularly, it represents part of another, more complex, mental construct: the definition of a particular crime.

Thus, there is nothing inherent in the concept LEGAL ELEMENT requiring that an element include only one concept. This is confirmed by the fact that there exists the concept SUB-ELEMENT—something that would be impossible if elements are inherently indivisible. The proof that the concept SUB-ELEMENT exists is that the word *sub-element* exists. A Westlaw or Lexis search turns up cases where courts have referred to sub-elements of a crime, tort, or other cause of action,[25] as well as instances of the same usage in various secondary legal authorities.[26] A Google search finds the word on more than 250,000 web pages.

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25. *E.g.*, *Medley v. Runnels*, 506 F.3d 857, 864 (9th Cir. 2007); *Vazquez-Filippetti v. Banco Popular de Puerto Rico*, 504 F.3d 43, 49 (1st Cir. 2007); *United States v. Harris*, 104 F.3d 1465, 1471 n.6 (5th Cir. 1997); *United States v. Pelullo*, 964 F.2d 193, 209 (3d Cir. 1992); *State v. Davis*, 96 Wash. App. 1058, 1999 WL 557294 at *5 (1999); *State v. Nieves*, 1997 WL 89213 at *3 (Ohio App. 1997).

26. *E.g.*, Judicial Committee on Model Jury Instructions for the Eighth Circuit, MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT § 6.18.1622 (2007); Matthew Engle, *Due Process Limitations on Victim Impact Evidence*, 13 CAP. DEF. J. 55, 78 (2000); David

The second problem with the one-concept-per-element theory lies in its assumption that a phrase such as *the use of physical force* denotes something—whether termed a "distinct attribute," a "factor," or a "thing"—that cannot be divided into smaller conceptual parts. As far as we know, nobody has ever tried to justify that assumption. That is surprising, because without this assumption, the theory is self-contradictory. The essence of the theory is that the concept THE USE OF PHYSICAL FORCE can constitute a single element but THE USE OF PHYSICAL FORCE COMMITTED BY A MEMBER OF THE VICTIM'S FAMILY cannot. If THE USE OF PHYSICAL FORCE really represents a combination of other, more basic, concepts, the question would arise whether there is any reasoned basis for making the distinction that the theory draws.

The assumption, in our view, is unjustified. Just as legal elements can have sub-elements, concepts can consist of multiple sub-concepts. This is most obviously true of the concepts expressed by phrases or sentences (e.g., THEORIES OF STATUTORY INTERPRETATION or HOLDING YOUR BREATH UNTIL YOU TURN BLUE); the concepts expressed by individual words are connected into a conceptual structure, with the connections being expressed by the grammatical structure.[27]

This is true of the concept expressed by *the use of physical force*. The grammatical form of the phrase joins the concepts USE and PHYSICAL FORCE in a manner indi-

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Goldstone & Peter Toren, *The Criminalization of Trademark Counterfeiting*, 31 CONN. L. REV. 1, 8 (1998).

27. *See, e.g.*, Ray Jackendoff, FOUNDATIONS OF LANGUAGE ch. 5, 12 (2002); Gregory L. Murphy, THE BIG BOOK OF CONCEPTS ch. 12 (2002); 1 Leonard Talmy, TOWARD A COGNITIVE SEMANTICS 21 (2000).

cating that physical force is the thing being used. And those two concepts can themselves be seen as having a multipart internal structure. A use is an action that has certain prototypical characteristics: the action is performed by an animate entity, the action is purposeful, and the action involves something that serves as an instrument of accomplishing a purpose. This might be expressed more formally in terms something like this: X PERFORMS AN ACTION IN WHICH Y PLAYS AN ESSENTIAL ROLE, SUCH THAT Y ENABLES OR HELPS X TO PERFORM ACTION Z, AN INTENTIONAL ACTION BY X.[28]

The concept PHYSICAL FORCE has a similarly complex structure. To begin with, the general concept FORCE is modified, and therefore narrowed, by the concept PHYSICAL, thereby ruling out nonphysical phenomena that are metaphorically described in terms of force, such as intellectual reasoning (*He was persuaded by the force of her arguments*) or social pressure (*The store was forced to stop selling cigarettes because of community disapproval*). Furthermore, as the phrase *physical force* is used in the statute, it presumably means something more limited than force in the Newtonian sense of energy applied to mass, for otherwise it would encompass acts such as kissing someone or splashing water on them in a swimming pool. Indeed, the Ninth Circuit has held that the physical force to which the

28. Note the similarity between this attempt to decompose the meaning of *use* and the Court's definition of *use* as involving "active employment" of something. *E.g.*, *Watson v. United States*, 128 S. Ct. 579 (2007); *Bailey v. United States*, 516 U.S. 137 (1995).

statute refers does not include merely touching someone impolitely.[29]

Moreover, the sort of physical force that domestic violence entails probably does not include all acts that could in the abstract be considered violent. Performing an emergency tracheotomy on one's spouse presumably would not be regarded as using physical force, even though it involves cutting someone's throat. So, too, if Muhammad Ali had ever sparred with his daughter Laila, who is a professional boxer.[30] What this suggests is that the conception of physical force reflected in the definition of an MCDV incorporates notions of intention, consent, and justification that may be difficult to precisely define but that are nevertheless present. In short, there is more to *physical force* than meets the eye.

Once one starts breaking concepts down into their constituent parts, there is no non-arbitrary stopping place short of disassembling them completely. And if one does that, there will be so many separate pieces, and the pieces will be so abstract, that the process of decisionmaking would become hopelessly complicated. Thus, the idea of searching for indivisible concepts that can be counted as elements is misguided.

2. Faced with what we've said so far, one might argue, as the D.C. Circuit did in *Barnes*, that a single element can include separate concepts as subparts, but only if they are related to each other in such a way that the resulting multi-part element is "*necessarily* two-

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29. *United States v. Belless*, 338 F.3d 1063, 1067–68 (9th Cir. 2003). *See also United States v. Hays*, 2008 WL 2108079 at *4 (10th Cir. May 20, 2008).

30. *Cf. Laila Ali vs Muhammad Ali*, http://www.youtube.com/watch?v=M4J7WHiWRKM (accessed June 12, 2008).

pronged[.]"[31] In laying out this argument, the D.C. Circuit *asserted* that the definitions differed in the extent to which the relevant concepts were related, but did not attempt to explain that conclusion by describing the relationship that it thought was present in one statute but absent in the other. That failure may stem from the fact that ordinary legal analysis provides neither a framework for analyzing conceptual relatedness nor a vocabulary for discussing the issue meaningfully. We believe that this gap can be at least partly filled by building on some of the insights and methodologies of linguistics.

We will start by looking at the similarities and differences in how the two definitions are structured grammatically. (For this purpose, we are interpreting the definition of an MCDV the way the Fourth Circuit did.) The relevant portion of each definition is a noun phrase—a phrase whose grammatical core is a noun and which can function in a sentence as the subject or object. That phrase consists of a smaller noun phrase, which is followed by a relative clause (in the definition of an MCDV) or a prepositional phrase (in the definition of a crime of violence). This phrase-within-a-phrase structure becomes clear when the phrase is represented graphically:

MCDV:

Noun Phrase (NP)	
NP the use or attempted use of physical force, or the threatened use of a deadly weapon,	*Relative Clause (RC)* committed by a current or former spouse, parent, or guardian of the victim

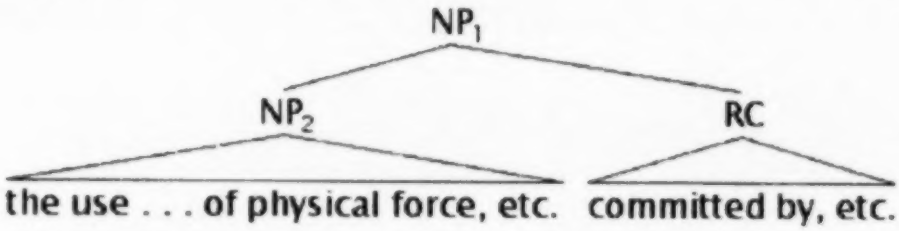
31. 295 F.3d at 1363 (emphasis added).

Crime of violence:

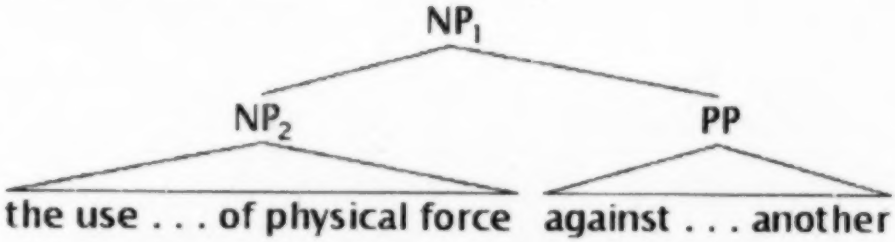
NP	
NP the use, attempted use, or threatened use of physical force	*Prep. Phrase (PP)* against the person or property of another

The structure can also be shown using a tree diagram (actually an upside-down-tree diagram):

MCDV:



Crime of violence:



The grammatical difference—relative clause versus prepositional phrase—is insignificant, because the relative clause and the prepositional phrase both have the same function in the overall noun phrase (NP_1 in the tree diagrams): they modify the smaller noun phrase that they immediately follow (NP_2).[32] This means

32. *See generally* CAMBRIDGE GRAMMAR OF THE ENGLISH LANGUAGE, *supra* note 11, at 445–46 (discussing post-head modifiers).

that they limit the set of entities that are otherwise designated by NP_2.[33] What we mean by this is that in both definitions, if NP_2 were unmodified, it would encompass all uses of physical force, but when it is combined with the modifier, the resulting phrase (NP_1) encompasses only some uses of physical force. In the definition of an MCDV, the subset consists of those uses of force that are committed by a current or former spouse, parent, or guardian of the victim; in the definition of a crime of violence, it consists of those that are committed against the person or property of someone other than the person using the force.

It might seem odd to say that uses of force against someone else or someone else's property are only a subset of all uses of physical force; after all, when we think about the illegal use of force, we generally think of force that the perpetrator directs against someone else. But while that may be the prototypical example of illegal force, it is not the only kind that exists. Depending on the circumstances and the jurisdiction, it can be illegal to use physical force against oneself (suicide;[34] self-injury by a member of the military, when done to avoid duty[35]), against one's own property (arson[36]), or against

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33. *See* Alan Cruse, MEANING IN LANGUAGE: AN INTRODUCTION TO SEMANTICS AND PRAGMATICS 301 (2d ed. 2004); CAMBRIDGE GRAMMAR OF THE ENGLISH LANGUAGE, *supra* note 11, at 1064; Paul Portner, WHAT IS MEANING: FUNDAMENTALS OF FORMAL SEMANTICS 61–69 (2005).

34. *E.g.*, *Wackwitz v. Roy*, 418 S.E.2d 861 (Va. 1992).

35. 10 U.S.C. § 915 Art. 115.

36. 3 Wayne R. LaFave, SUBSTANTIVE CRIMINAL LAW § 21.3(d) (2d ed. 2003).

something that is not private property at all (illegally harming a wild animal[37]).

There is a further indication that the relative clause in the definition of an MCDV is functionally equivalent to the prepositional phrase in the definition of a crime of violence: one provision's grammatical form can be switched for the other's, without any change in meaning. Thus, the definition of an MCDV could be rewritten as *the use or attempted use of physical force, or the threatened use of a deadly weapon, by a current or former spouse, parent, or guardian of the victim* and the definition of a crime of violence could be rewritten as *the use, attempted use, or threatened use of physical force committed against the person or property of another*.

What we have said suggests that the relationship between the sub-elements in the definition of an MCDV is analogous to the relationship between the sub-elements in the definition of a crime of violence. That conclusion is reinforced when one looks beyond the definitions' grammatical structure to their underlying conceptual structure.

The notion of conceptual structure that we are referring to is based on the idea that words stand for concepts and that when words are arranged according to the rules of grammar, a structure is imposed not only on the words but on the concepts they represent. Verbs and nouns, the basic building blocks of a sentence, correspond to basic conceptual building blocks: events and entities that play a role in events.[38]

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37. *E.g.*, 16 U.S.C. § 1538(1)(B), (C).

38. *E.g.*, William Frawley, LINGUISTIC SEMANTICS ch. 3–5 (1992); Michael Gasser, HOW LANGUAGE WORKS § 6.2, <www.indiana.edu/~hlw/Sentences/schemas.html> (ed. 3.0 2006) (accessed June 12, 2008)). The correspondence between events and verbs isn't perfect. Events can be expressed as nouns (*the use of*

With only a few possible exceptions, events involve entities that play roles in the event. The event SLEEP assigns the role of SLEEPER; the event THROW assigns the roles of THROWER and THROWN OBJECT. And (to get back to the MCDV and crime-of-violence statutes), the event USE OF FORCE assigns the roles we will call FORCE-USER and TARGET.

In the definition of an MCDV, both the force-user and the target are mentioned expressly (*the use of physical force committed by a relative* [FORCE-USER] *of the victim* [TARGET]), but no information is provided about the target except for his or her status as a current or former spouse, parent, or guardian of the force-user. In the definition of a crime of violence, only the target is mentioned expressly: *the use of physical force against the person or property of another* [TARGET]. But the word *another* implicitly points to the force-user, because it is understood to mean *a person other than the person using physical force*.

The category labels we have given for the type of event and the type of role-players (use of force, force-user, and target) are tied closely to the specific type of event that the statutes are concerned with. But the action of using force (in the legal, not Newtonian, sense) isn't *sui generis*. It can be considered as belonging to a category of actions that are similar in terms of the minimum number of role-players involved, the defining characteristics of the role-players, and the relationship of the role-players to the action and to one another. For example, it could be described as part of a category of

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force), and even in that form they are associated with role-players. Thus, *Jim's use of force against Bob* is conceptually equivalent to *Jim used force against Bob*. *See, e.g.*, Ray Jackendoff, FOUNDATIONS OF LANGUAGE 137 (2002).

actions, which we will call DO-TO type actions, that includes throwing, breaking, cutting, folding, hammering, washing, painting, and consuming.[39] These actions have several distinguishing characteristics. They all involve volitional action, so at least one of the role-players must be an entity capable of such action. And they all involve one role-player doing something that affects the other in some way. Rather than using different labels for the role-players corresponding to each action (THROWER and THROWN OBJECT, BREAKER and BROKEN OBJECT, etc.), one pair of labels can be used for all the DO-TO actions. We will call the doer the AGENT and the entity to which the action is done the UNDERGOER.[40]

Considered together, the relevant event type and the role-player categories associated with it make up a sort of conceptual template, which can be represented using a variation on the tree-diagrams we used above:

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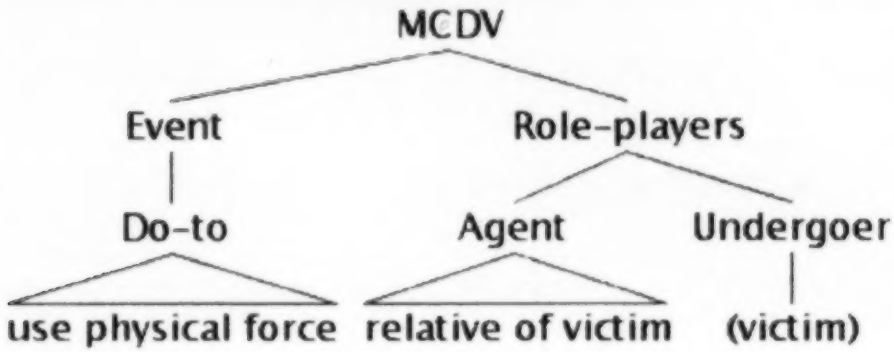
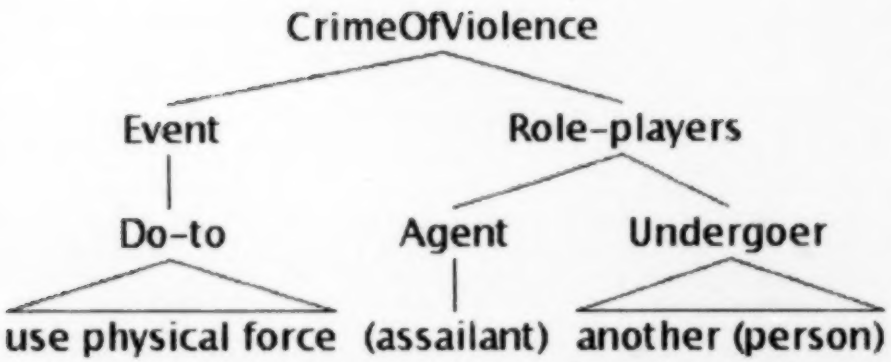
39. The DO-TO label is borrowed from HOW LANGUAGE WORKS, *supra* note 38, § 6.2. We should note that the categories we have sketched out here are simplifications and are not what a linguist would regard as a theoretically-adequate taxonomy of event types. For more detailed discussion of the structure and categorization of events, see, e.g., Steven Pinker, THE STUFF OF THOUGHT ch. 2–3 (2007); Beth Levin & Malka Rappaport Hovav, ARGUMENT REALIZATION (2005); Beth Levin, ENGLISH VERB CLASSES AND ALTERNATIONS: A PRELIMINARY INVESTIGATION (1993).

40. The term more commonly used in linguistics is "patient."

This template can then be completed by filling in the slots with the appropriate words or phrases from the sentence at issue. The completed templates for the definition of an MCDV and the definition of a crime of violence are as follows (with the words in parentheses representing words that are not expressly stated in the statute but are implicitly understood):[41]

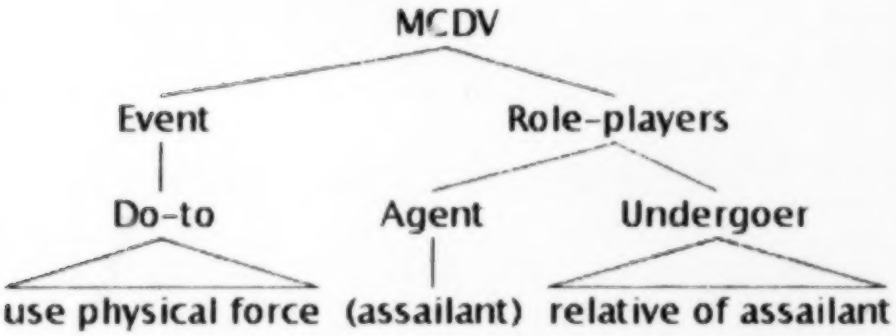


41. To keep things simple, we are treating *the use of force* as a fixed expression that functions similarly to a single word rather than as a phrase.

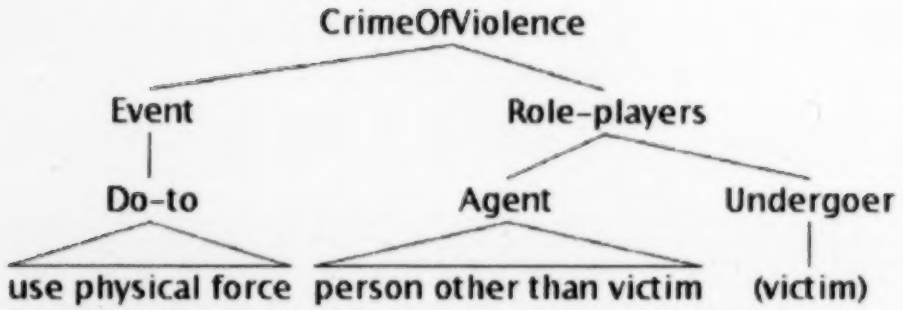


These diagrams represent the conceptual structure underlying the two statutory definitions. And what is immediately apparent is that the two structures are virtually identical. They differ only in terms of where the relationship between the agent and the target is expressed. In the definition of an MCDV it is part of the description of the agent, while in the definition of a crime of violence it is part of the description of the target. But this difference is inconsequential, because it would be possible to rewrite each definition using the other one's conceptual and grammatical structure, without changing either definition's meaning:

MCDV: the use of physical force against [a relative of the assailant].



Crime of violence: the use of physical force committed by a person other than the person against whom the force was directed.



C. The question of how ordinary readers would most likely understand the statute is an empirical one.

We have focused so far on showing that as a matter of ordinary meaning the Fourth Circuit's interpretation of § 921(a)(33)(A) is a reasonable one. We turn now to the question whether one or the other of the interpretations better reflects the "natural" reading of the statutory language; i.e., what an ordinary reader would understand the statute to mean.

That question is ultimately an empirical one, and it would be possible to try to answer it empirically by conducting an experiment that would elicit test subjects' understanding of the statute.[42] We have not conducted such an experiment, and we are reluctant to speculate about what the outcome would be. We can, however, offer some observations about what one would expect, given what is known about how people understand and interpret language.

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42. The experiment would have to involve something more complicated than just asking people which interpretation they agreed with. The understanding to be elicited is what people would arrive at automatically as a matter of ordinary reading comprehension, not what they would conclude after focusing consciously on the interpretive issue.

The most obvious point is that the Fourth Circuit's interpretation is consistent with the statute's paragraph structure, while the government's is not. Paragraph breaks don't typically occur within a sentence, but when they do, readers are likely to treat them as providing cues as to how the sentence is organized. And it is quite appropriate for them to do so, because that is the reason why legislative drafters break statutes up into sections, subsections, paragraphs, and so on.[43] Paragraph breaks that occur within a single sentence serve in effect as a form of punctuation, if punctuation is defined broadly as any typographical device used to indicate the grammatical structure of a particular string of words.[44] It is well established that readers rely on punctuation as an indicator of grammatical structure, much as they often rely on a speaker's rhythm and intonation as an indicator of grammatical structure in spoken language. While we recognize that the Court has sometimes minimized the significance of punctuation, the fact remains that punctuation often plays an important role in language as we normally read it.[45]

This structure-signaling function is reinforced here by the fact that subparagraphs (i) and (ii) each correspond to units of grammatical structure (verb phrases), as shown in this tree diagram:

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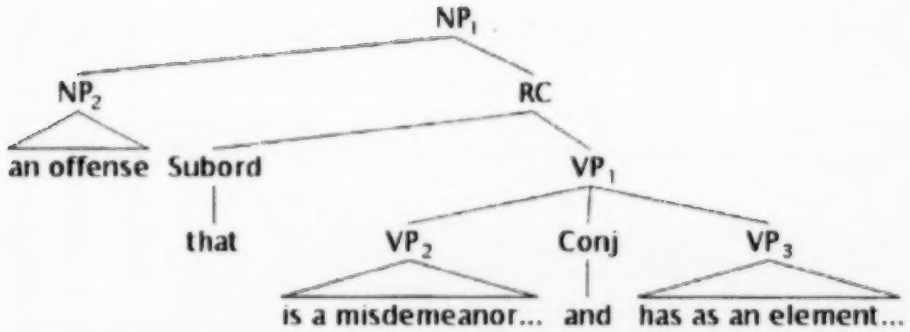
43. *E.g.*, Tobias A. Dorsey, LEGISLATIVE DRAFTER'S DESKBOOK: A PRACTICAL GUIDE 209 (2006).

44. *See* CAMBRIDGE GRAMMAR OF THE ENGLISH LANGUAGE, *supra* note 11, at 1724–25; Geoffrey Nunberg, THE LINGUISTICS OF PUNCTUATION 17, 73–75 (1990).

45. *See, e.g.*, Robin Hill & Wayne Murray, *Commas and Spaces: Effects of Punctuation on Eye Movements and Sentence Parsing*, in Alan Kennedy et al., eds., READING AS A PERCEPTUAL PROCESS ch. 22 (2000).

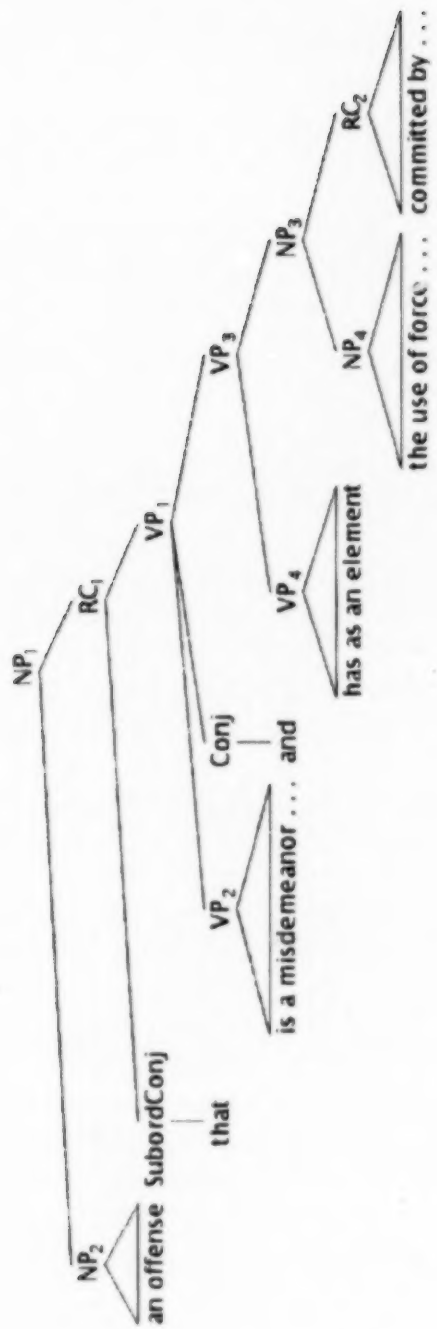


Because there is no paragraph break before the *committed by* clause, the reader is given no visual cue suggesting that that clause is not part of subparagraph (ii).

If one assumes that the grammatical structure of § 921(a)(33)(A) parallels its paragraph structure, as the Fourth Circuit's interpretation does, the grammatical structure is as shown on the next page. As that diagram shows—

- The subsection as a whole is a noun phrase (NP_1).
- That noun phrase consists of a smaller noun phrase (NP_2) modified by a relative clause (RC_1).
- The relative clause consists of the subordinator *that* followed by a verb phrase (VP_1).
- VP_1, in turn, consists of two conjoined verb phrases (VP_2 and VP_3).
- We are concerned here with VP_3, which consists of a verb phrase (VP_4) and a noun phrase (NP_3).
- Finally, NP_3 consists of yet another noun phrase (NP_4), which is modified by a relative clause (RC_2).

Note that RC_2 is in fact a relative clause even though it is not introduced by *that* or *which* and therefore may look like an ordinary verb phrase. Specifically, it is a "reduced relative" and is understood to mean the same


NP1
RC1
VP1
VP3
NP3
RC2
NP2
SubordConj
VP2
Conj
VP4
NP4
an offense
that
is a misdemeanor . . .
and
has as an element
the use of force . . .
committed by . . .

thing as *that is committed by a current or former spouse, parent, or guardian of the victim.*[46]

There are also two possible alternative structures. One (which is not what the government argues for, but which would not support the Fourth Circuit's interpretation) would in effect make the *committed-by* clause a new subparagraph (iii), as if the statute had looked like this:

> [T]he term "misdemeanor crime of domestic violence" means an offense that—
>
> (i) is a misdemeanor under Federal or State law; and
>
> (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon,
>
> (iii) committed by a current or former spouse, parent, or guardian of the victim

This paragraph structure corresponds to the phrase structure shown in the tree on the next page.

This structure is problematic, however. The presence of the conjunction *and* before subparagraph (i) and its absence before the new subparagraph (iii) suggests that there are two subparagraphs, not three. Whenever *and* is used in any series of three or more items, it must appear before the last item (*Tom, Dick, and Harry* is OK, as is *Tom and Dick and Harry*, but *Tom and Dick, Harry* is unacceptable).

Even without that problem, the reconfigured text would be an ungrammatical mess: *an offense that . . . committed by a current or former spouse, parent, or guardian of the victim*. This could be fixed only by

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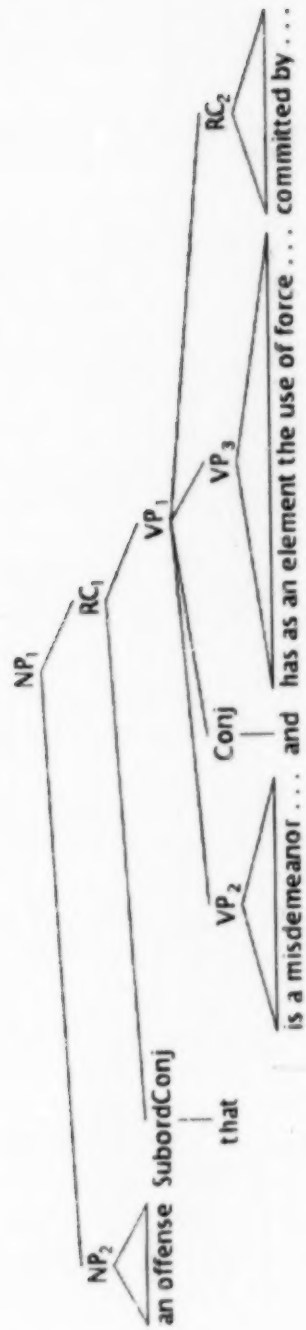
46. *See, e.g.*, Robert Lawrence Trask, A DICTIONARY OF GRAMMATICAL TERMS IN LINGUISTICS 231 (1992).


NP1
RC1
VP1
RC2
NP2
SubordConj
VP2
Conj
VP3
an offense
that
is a misdemeanor . . .
and
has as an element the use of force . . .
committed by . . .

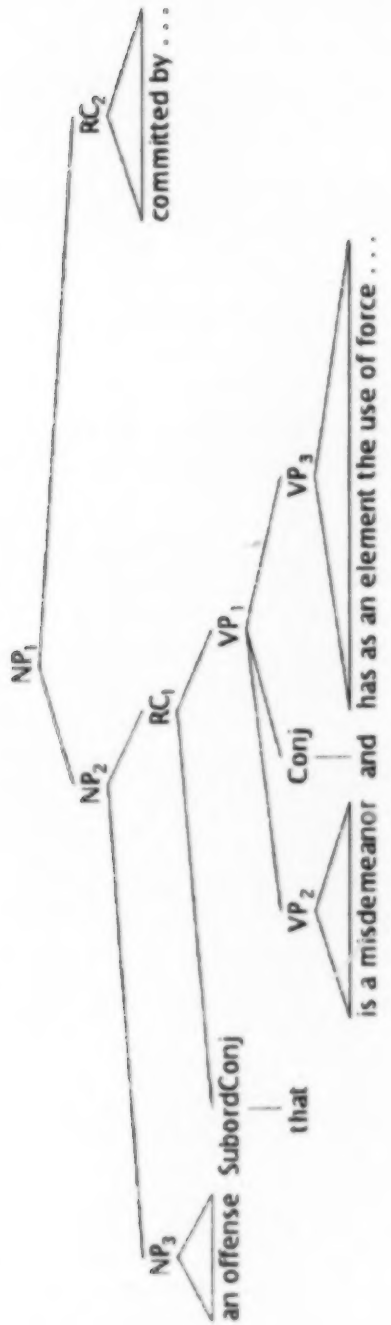
adding a word to the statute (*an offense . . . that is committed by a current or former spouse, parent, or guardian of the victim*) or by deleting one (*an offense . . . committed by a current or former spouse, parent, or guardian of the victim*).

In order to avoid this problem, the *committed by* clause (RC_2) would have to be removed from RC_1 altogether. The phrase structure necessary to accomplish this is shown on the next page; it corresponds to the following paragraph structure:

> [T]he term "misdemeanor crime of domestic violence" means an offense that—
>
> (i) is a misdemeanor under Federal or State law; and
>
> (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon,
>
> committed by a current or former spouse, parent, or guardian of the victim

This is essentially the structure that the government argues in favor of, except that the government ignores the indentation of subparagraphs (i) and (ii).

By detaching *committed by a current or former spouse, parent, or guardian of the victim* from subparagraph (ii), this structure would make it clear that the *committed by* clause should not be read as part of that subparagraph. And because that phrase would be at the same level of indentation as *an offense*, it would be clear that it is at a higher level in the hierarchical structure of the statutory text. Both of these factors are reflected in the corresponding phrase-structure tree, which is shown on the next page.


NP1
NP2
RC1
VP1
VP3
RC2
committed by . . .
NP3
an offense
SubordConj
that
VP2
Conj
is a misdemeanor
and
has as an element the use of force . . .

In addition to the paragraph structure, there is at least one more factor that would tend to incline readers toward the Fourth Circuit's interpretation. The issue here—the way that structurally ambiguous sentences are understood—has been studied by researchers in psycholinguistics. For the most part they agree that all other things being equal, there is a tendency for the ambiguous word or phrase to be linked with the most recently processed part of the sentence.[47] This translates into a phrase structure in which the word or phrase in question is attached to the phrase-structure tree at a point close to those that it immediately follows. The phrase structure associated with the Fourth Circuit's interpretation is consistent with this "recency" preference: the *committed by* clause is part of the *use of force* phrase. The phrase structure associated with the government's interpretation, on the other hand, is very clearly inconsistent with that preference.[48] (The same

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47. *E.g.*, Daniel Grodner & Edward Gibson, *Consequences of the Serial Nature of Linguistic Input for Sentential Complexity*, 29 COGNITIVE SCIENCE 261, 262–63 (2005).

48. It has been suggested that the recency preference does not play a role in interpreting relative clauses. *See* Lyn Frazier & Charles Clifton, Jr., CONSTRUAL 28–32, 69–92 (1996). This does not represent the dominant view within the field, but even under this theory, the Fourth Circuit's interpretation would be the more likely one. The theory predicts that relative clauses are interpreted within a "processing domain" that is defined by the most recent word that assigns semantic roles of the sort that we discussed above—most typically verbs but some times nouns. With respect to the *committed by* clause, that domain would be limited to the *use of force* phrase, in which *use* functions as a role-assigner. The possibility of the clause being associated with *an offense* would be blocked by the intervention of other role-assigning words: *is a misdemeanor* and *has as an element*.

thing is true, albeit to a lesser extent, with respect to the interpretation discussed on page 30, above.)

This is not necessarily decisive, though, because the recency preference is only one of the factors that can affect how sentences are understood. Others include the context in which the sentence appears, the relative real-world plausibility of the two possible interpretations, the relative frequencies of the different senses in which a word might be construed and of the alternative possible grammatical structures, and the speaker's rhythm and intonation (or, in the case of written text, the punctuation).[49]

Two of these factors that weigh in on the government's side of the scale. One is the relative rarity of constructions such as *the use of force committed by someone* compared to *an offense committed by someone*. There might be some people for whom the former sounds sufficiently odd that they would be pushed toward the government's interpretation. The second is the comma that appears before the *committed-by* clause, which might have a similar effect.

However, it is not clear that the comma would have this effect. On the contrary, the comma could also be interpreted in a way that would have the opposite effect: Rather than being interpreted as simply separating the *committed by* clause from what comes before it, it can be understood as the second of a pair of commas appearing on either side of *or the threatened use of a deadly weapon*:

---

49. *See, e.g.*, Martin Pickering & Roger Van Gompel, *Syntactic parsing*, in Matthew Traxler & Morton Ann Gernsbacher, eds., THE HANDBOOK OF PSYCHOLINGUISTICS , ch. 12 (2d ed. 2006) (available in manuscript form at <http://www.dundee.ac.uk/psychology/rpgvanGompel/papers/Traxler.pdf> (accessed June 12, 2008)); *Commas and Spaces*, *supra* note 45.

> has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by . . .

Under this reading, the commas would act as "delimiting" commas, meaning that they set the phrase between them off from the surrounding text, rather than simply separating two elements. They would signal that the *committed by* clause modifies both *the threatened use of a deadly weapon* and the phrase before it—*the use or attempted use of physical force.* (Compare *Jane lost, and Bill found, the key to the storeroom.*)[50]

There is another factor that might or might not be relevant. Under the government's interpretation, the word *offense*, which appears only once, has to be understood as being used in two different ways. As modified by *is a misdemeanor* and *has as an element*, it is used to denote a particular *type* of event. But as modified *an offense . . . committed by a relative of the victim*) it denotes an *instance* of such an event, namely the commission of a criminal act by a particular person against a particular person. Whether this would affect a reader's understanding of the statute is unclear.

As the Court may have noticed, the recency preference that we have referred to looks strikingly similar to the rule of the last antecedent, which the Fourth Circuit relied on.[51] That rule is therefore an example of a principle of legal interpretation that has a solid linguistic basis. And considering that the rule dates

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50. *See* Geoffrey Nunberg, THE LINGUISTICS OF PUNCTUATION 38 (1990); CAMBRIDGE GRAMMAR OF THE ENGLISH LANGUAGE, *supra* note 11, at 1343–54, 1746.

51. This was first noted in Lawrence Solan, THE LANGUAGE OF JUDGES 31–34 (1993).

back more than a hundred years,[52] this is an instance in which the law anticipated later developments in linguistics.

However, there can be a tendency for the rule of the last antecedent to be applied too woodenly. To begin with, it is important when looking for the "last antecedent" to keep in mind that sentences are not just strings of words one after the other. As our tree diagrams have shown sentences have a structure, and that structure affects the way in which a phrase at or near the end of the sentence is interpreted. And one should be especially careful with respect to the punctuation-based exception the government relies on.[53] Although punctuation can indeed influence understanding, its effect cannot be reduced to a rigid formula. As shown by our discussion of the comma before the *committed by* clause, it is necessary to attend to the punctuation's function in the sentence, not just to where in the sentence it appears.

We close with a caveat. Taking account of the way that readers process and understand what they read is not necessarily appropriate when one's goal is to determine what the author of a text subjectively intended. The processes involved in understanding language are not necessarily the same as those involved in speaking or writing. Authors often fail to recognize ambiguities lurking in what they write and therefore don't realize that the text can be interpreted in a way they did not intend. This is illustrated by headlines such as *British Left Waffles on Falkland Islands* and *Squad Helps Dog Bite Victim*. It is therefore possible that the staffer who

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52. Jabez Sutherland, STATUTES AND STATUTORY CONSTRUCTION 349 (1891).

53. Gov't Br. 20.

composed § 922(a)(33)(A)—presumably at Senator Lautenberg's direction—intended it to mean what the government contends it does.

But to the extent that it is appropriate to consider legislative intent (as opposed to purely textual meaning), the focus is on what *Congress* intended, not on what was intended by the person who actually put pen to paper or fingers to keyboard. In enacting legislation, senators and representatives approve a preexisting text that was drafted by someone else. If ordinary meaning is regarded as indicating what the legislators understood the statute to mean and therefore what they intended, considering how language is understood is indeed appropriate.

Conclusion

We have attempted in this brief to show how linguistics can shed new light on the sorts of interpretive issues that courts regularly face. We would urge the Court to draw on the analysis we have presented when it decides this case.

Respectfully submitted,

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APPENDIX

Appendix A
Amici Curiae

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Appendix B
Examples of *use of force* as a complement of *commit*
(Emphasis added in all cases)

Statutes

The following words and phrases when used in this act shall have the meanings given to them in this section unless the context clearly indicates otherwise:

. . .

"Terrorism." The unlawful *use of force or violence committed by* a group or individual against persons or property to intimidate or coerce a government, the civilian population or any segment thereof in furtherance of political or social objectives.

- Pa. Cons. Stat., tit. 35, § 2140.102

(2) The Nebraska State Patrol shall not issue a permit to store or use explosive materials to any person who:

. . .

(h) Has been convicted in any court of a misdemeanor crime of domestic violence. This includes any misdemeanor conviction involving *the use or attempted use of physical force committed by* a current or former spouse, parent, or guardian of the victim or by a person with a similar relationship with the victim;

- Neb. Rev. Stat. § 28-1229

To use or to attempt to offer to use force or violence upon or toward the person of another is not unlawful in the following cases:

1. *When necessarily committed by* a public officer in the performance of any legal duty, or by any other person assisting such officer or acting by such officer's direction;

2. *When necessarily committed by* any person in arresting one who has committed any felony, and delivering such person to a public officer competent to receive such person in custody;

3. *When committed either by* the person about to be injured, or by any other person in such person's aid or defense, in preventing or attempting to prevent an offense against such person, or any trespass or other unlawful interference with real or personal property in such person's lawful possession; provided the force or violence used is not more than sufficient to prevent such offense;

4. *When committed by* a parent or the authorized agent of any parent, or by any guardian, master or teacher, in the exercise of a lawful authority to restrain or correct such person's child, ward, apprentice or scholar, . . .;

5. *When committed by* a carrier of passengers, or the authorized agents or servants of such carrier, or by any person assisting them at their request, in expelling from any carriage, railroad car, vessel or other vehicle, any passenger who refuses to obey a lawful and reasonable regulation prescribed for the conduct of passengers, . . .; and

6. *When committed by* any person in preventing a person who is impaired by reason of mental retardation or developmental disability as defined by Section 1430.2 of Title 10 of the Oklahoma Statutes, a mentally ill person, insane person or other person of unsound mind, including persons temporarily or partially deprived of reason, from committing an act dangerous to such per-

son's self or to another, or enforcing such restraint as is necessary for the protection of the person or for restoration to health, during such period only as shall be necessary to obtain legal authority for the restraint or custody of the person.

- 21 Okla. Stat., tit. 21, § 643

For purposes of determining whether a defendant has a prior conviction for violation of this Section, a conviction under this Section or a conviction under the laws of any state or an ordinance of a municipality, town, or similar political subdivision of another state which prohibits *the intentional use of force or violence committed by* one household member upon another household member of the opposite sex presently or formerly living in the same residence with the defendant as a spouse, whether married or not, shall constitute a prior conviction.

- La. Rev. Stat. Ann. § 14:35.3.A.G(1)

Cases

Consequently, although defendant Jensen need not have actually made contact with plaintiff to defeat her qualified immunity claim, the undisputed facts on record indicate that defendant Jensen did not have the opportunity or the means to prevent *the alleged use of excessive force committed by* defendant Whitehead.

- *Owens v. Chrisman*, 2008 WL 217118 at *7 (M.D. Tenn. 2008)

Plaintiffs here assert that *the alleged use of excessive force, although committed by* subordinate-level police

officers, is chargeable to the Town because of Chief McCue's presence at the demonstrations.

- *Amnesty America v. Town of West Hartford*, 361 F.3d 113, 127 (2d Cir. 2004)

In his first count, Plaintiff claims that the DCHA, along with Officer Greene and several unnamed, never identified, never served Doe Defendants, violated his Fifth Amendment rights: (1) by "collud[ing] with each other [ ] in order to avoid liability for the injuries Plaintiff sustained because the building was left unguarded" and "*the use of excessive force committed by* [Officer] Greene". . . .

- *Steele v. District of Columbia Housing Authority*, 2006 WL 335770 at *4 (D.D.C. 2006)

Lastly, plaintiff claims defendant BELL's failure to curb the abusive conduct of the other defendants constituted deliberate indifference and contributed to and caused *the excessive use of force committed by* the other defendants.

- *Fry v. Dretke*, 2005 WL 578447 at *1 (N.D. Tex. 2005)

Plaintiff states that the death of decedent TyRon Lewis was the result of *the alleged negligent use of excessive force committed by* Officers Knight and Minor. . . . The affidavit submitted in opposition to summary judgment does not address the investigatory or disciplinary policies of Defendant, but instead merely addresses the alleged negligent use of excessive force committed by Officers Knight and Minor.

- *Lewis v. City of St. Petersburg*, 98 F.Supp.2d 1344, 1349, 1356 (M.D. Fla. 2000)

A deputy public defender filed in the municipal court a declaration to obtain a subpoena duces tecum directed to the chief of police to compel production of:

. . .

"(5) Verbatim copies of all records, reports, reports of investigations and all other writings pertaining to the use of aggressive conduct, *excessive force and/or violence committed by* said officers in the possession of the Bureau of Internal Affairs."

- *Caldwell v. Municipal Court*, 129 Cal. Rptr. 834, 835(Cal. App. 1976)

However, in the prior charges to which we have adverted the instructions to the jury were clearly erroneous, and therein the court overlooked the express provisions of subdivision 1 of section 246 of the Penal Law, that *the use of force is not unlawful "when necessarily committed by* a public officer in the performance of a legal duty."

- *People v. Denker*, 225 App. Div. 517, 520 (N.Y. Sup. Ct. 1929)

Books

To put the question in another way, does participation by an individual in every act of aggression or unlawful *use of force committed by* a State constitute a crime against peace by that individual?

- Elizabeth Wilmshurst, *Definition of the Crime of Aggression: State Responsibility or Individual Criminal Responsibility?* in Mauro Politi & Giuseppe Nesi, eds., THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION 93, 94 (2004)

The extent of the obligation imposed upon the members of a total or partial community to come to the assistance of the victim of *an illegal use of force committed* within this community may differ.

- Hans Kelsen, COLLECTIVE SECURITY UNDER INTERNATIONAL LAW 24 (Naval War College, International Securities Studies (1957; Lawbook Exchange, Ltd. ed. 2001)

Law review articles

The imputability to a state of *the use of force committed by* its agents is also established in the Definition of Aggression. If the injury amounts to use of force, that use of force is considered to have been committed by the responsible state.

- Davis Brown, *Use of Force against Terrorism after September 11th: State Responsibility, Self-Defense and Other Responses*, 11 CARDOZO J. INT'L & COMP. L. 1, 8, 17 (2003)

A survey of law enforcement agencies conducted by the Police Foundation and funded by the National Institute of Justice, attempted to compile the number of incidents of *excessive use of force committed by* police during 1991.

- Alexa P. Freeman, *Unscheduled Departures: the Circumvention of Just Sentencing for Police Brutality*, 47 HASTINGS L.J. 677, 688 (1996)

As such, the rules of engagement will not amount to "penal provisions" within the meaning of art 65 of Geneva Convention IV unless the term "penal pro-

visions" includes all defences to *the use of force committed by* soldiers.

- Pete Rowe, *The Rules of Engagement in Occupied Territory: Should They Be Published?*, 8 MELBOURNE J. INT'L LAW ___, ___ (2007) (available at <http://www.mjil.law.unimelb.edu.au/issues/archive/2007(2)/09Rowe.pdf>; see page 7 of PDF document)

Miscellaneous

Fears have been raised in the media that the commission, established on October 19, 2000 with the mandate to gather and compile information on *"the disproportionate and indiscriminate use of force" committed "by* the Israeli occupying power against innocent and unarmed Palestinian citizens," may recommend that Israel be indicted for war crimes.

- Jonathan Krashinksy, *UN Commission acknowledges need for security closures*, JERUSALEM POST, 2001 WLNR 197202 (Feb. 15, 2001)

Appendix C
Examples of *act of force* as a complement of *commit*
(Emphasis added in all cases)

Statute

Every person who with the intent to cause a riot does an act or engages in conduct that urges a riot, or urges others to *commit acts of force* or violence, or the burning or destroying of property, and at a time and place and under circumstances that produce a clear and present and immediate danger of acts of force or violence or the burning or destroying of property, is guilty of incitement to riot.

- Cal. Penal Code § 404.6(a)

Cases

"The evidence clearly demonstrates and this court finds that both Bryan Lankford and Mark Lankford *committed acts of force* and violence directly upon the persons of Mr. and Mrs. Bravence which acts directly and proximately caused the deaths of Mr. and Mrs. Bravence."

- *Lankford v. Idaho*, 500 U.S. 110, 117 n.11 (1991) (quoting trial judge)

It is important to understand that *acts of violence or force committed* against members of a hated class of people with the intent to exact retribution for and create dissuasion against their use of public facilities have a long and intimate historical association with slavery and its cognate institutions.

- *United States. v. Nelson*, 277 F.3d 164, 189 (2d Cir. 2002)

Clause (b) permanently enjoined physical restraining or obstructing or *committing acts of force* or violence against persons entering, leaving, or working at or seeking services from any such facility.

- *Planned Parenthood League of Massachusetts, Inc. v. Blake*, 631 N.E.2d 985, 993 n.16 (Mass. 1994)

Reasonable minds could certainly conclude, as apparently the jury did in this case, that the appellant here *committed his acts of force* "in fleeing immediately after" the theft.

- *State v. Lynch*, 1993 WL 155664 at *3 (Ohio App. 1993)

Books and articles

The court emphasized that under the concept of "breach of the peace" the secured creditor, in exercising the privilege to enter upon the premises of another to repossess collateral, may not *commit any act of force* or violence, or naturally calculated to provoke a breach of the peace.

- 1 Raymond T. Nimmer, COMMERCIAL ASSET-BASED FINANCING § 5:20

That bill, in Section 1, makes criminal the commission, or attempt or threat to *commit any act of force* against any person or any property with intent to cause the change of the Government of the United States or any of the laws thereof, or to oppose or hinder the execution

of any law of the United States; such an offense is "sedition," and punishable by fine and imprisonment up to twenty years.

- K.N.L., *Free Speech in Time of Peace*, 29 YALE L.J. 337, 341 (1920)

The DeMetris were involved in fixing only one race while the other defendants were charged with *committing acts of force* and violence that did not involve the DeMetris.

- Barry Tarlow, *RICO Revisited*, 17 GA. L. REV. 291, 422 (1983)

In the first place, Nicaragua charges that officials and employees of the United States government acting under color of office and in the line of duty, have themselves *committed acts of force* against Nicaragua in violation of article 2(4).

- Abram Chayes, *United States, Nicaragura and the World Court*, 85 Colum. L. Rev. 1445, 1464 (1985)

AMICUS CURIAE BRIEF

No. 07-608

Supreme Court, U.S.
FILED
SEP 26 2008
OFFICE OF THE CLERK

In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

RANDY EDWARD HAYES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF *AMICUS CURIAE* OF SECOND AMENDMENT FOUNDATION, INC. IN SUPPORT OF RESPONDENT

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When a Prior Conviction Qualifies as a "Misdemeanor Crime of Domestic Violence," 31 Op. Off. Legal Counsel 1 (2007) 16

INTERESTS OF AMICUS CURIAE[1]

Second Amendment Foundation ("SAF"), a tax-exempt organization under § 501(c)(3) of the Internal Revenue Code, is a non-profit educational foundation incorporated in 1974 under the laws of the State of Washington. SAF seeks to preserve the effectiveness of the Second Amendment through educational and legal action programs. SAF has over 650,000 members and supporters residing in every state of the Union.

SAF files this amicus curiae brief to highlight the fact that the decision below is consistent with the concepts of federalism underlying and inherent in the basic federal gun control law.[2] The Fourth Circuit's decision is also consistent with this Court's "categorical approach" to examining the impact of prior convictions in applying the Gun Control Act, and sound considerations of public policy. Finally, this case provides an instructive view as to the interplay between Second Amendment rights and traditional notions of due process. This Court should take such

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members or its counsel made a monetary contribution to its preparation or submission.

[2] Pursuant to Sup. Ct. R. 37.3(a), counsel of record for both Petitioner and Respondent have consented to the filing of this brief in letters that have been lodged with the Clerk.

considerations into account in applying the rule of lenity.

SUMMARY OF ARGUMENT

Disarming violent domestic abusers is a laudable public policy goal, achievable in a manner consistent with the Constitution. Like other valuable civil rights, the right to keep and bear arms may be forfeited by engaging in violent criminal activity. Individuals convicted of violently abusing those closest to them may be barred access to firearms.

Whether Congress possesses constitutional authority to disarm violent individuals is not an issue in this case. But when Congress itself adopts federalist limitations on its powers, this Court should not impose a broader view of congressional authority upon an allegedly ambiguous legislative text. The provision before the Court, however it might be interpreted standing alone, is embedded within a statutory scheme that unmistakably rejects uniform federal standards governing the possession of firearms.

This Court has recently had occasion to examine the impact of prior convictions on application of the Armed Career Criminal Act, and settled on a "categorical approach" to the task. Extrinsic evidence of the offense, including evidence as to the manner in which the offense was committed, is barred by this approach. Rather, this Court looks primarily to the

legal definition of the predicate offense to determine its future impact. The Government's proposed interpretation of Section 922(g)(9) contradicts this settled doctrine.

Respecting the Gun Control Act's traditional limitations would also better serve the public policy goal of combating domestic violence. It would encourage states to enact stronger laws targeting domestic violence, discourage plea bargaining serious assault cases to yet lower level offenses, and preserve the discretion needed by local prosecutors to perform their tasks in a just and efficient manner.

That the Government seeks to find an individual's fundamental, enumerated rights extinguished by a guilty plea is also significant. Like other enumerated fundamental rights, Second Amendment rights may be relinquished only upon a voluntary, knowing, and intelligent waiver. Respondent cannot now be deprived of a fundamental right as a consequence of his voluntary plea, where such loss could not have been contemplated at the time he pled guilty.

ARGUMENT

I. THE GUN CONTROL ACT RESPECTS BASIC PRINCIPLES OF FEDERALISM IN ASSIGNING THE DETERMINATION OF PREDICATE OFFENSES TO THE STATES.

A. The Gun Control Act's Plain Text Leaves the States Ample Room for Determining the Applicability of Federal Gun Penalties.

The Government's claim that Congress "could [not] have intended to address what it regarded as a nationwide problem by enacting a law that would inevitably operate in a patchwork and haphazard manner," Pet. Br. 9, underlies much of its reasoning. The claim does not withstand scrutiny.

The existence of federal gun laws speaks to Congressional understanding that gun violence is a national problem. But the plain text of the Gun Control Act of 1968, as amended, 18 U.S.C. § 921 *et seq.*,[3] acknowledges that federal solutions would indeed be applied differently in each state. This Court has rejected "hypertechnical reading" of statutory language that, while "not inconsistent with the language of [the] provision examined in isolation," nonetheless fails to account for the fact that "statutory language cannot be construed in a vacuum." *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803,

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[3] All further statutory references are to Title 18 of the United States Code unless otherwise indicated.

809 (1989). "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Id.* (citation omitted); *Owasso Indep. Sch. Dist. No. I-011* v. *Falvo*, 534 U.S. 426, 434 (2002). Section 922(g)(9) must be read in context.

The Government acknowledges that Section 922(g)(9) was enacted to extend the reach of Section 922(g)(1)'s prohibition on gun possession by felons. Pet. Br. 9. But application of that latter prohibition depends largely upon variations in state criminal laws, yielding the very patchwork of different results that the Government decries.

For purposes of Section 922(g)(1), an offense the conviction of which disqualifies individuals from gun possession "does not include – any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less." Section 921(a)(20)(B). "What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held." *Id.*

Thus identical conduct that is felonious in one state but only a misdemeanor in another earn individuals inconsistent treatment, nationwide, under Section 922(g)(1). For example, possessing four ounces of marijuana is a felony in Idaho, but only a misdemeanor in Texas. *Compare* Idaho Code § 37-2732(e) (2008) *with* Tex. Health & Safety Code

§ 481.121(b)(2) (2007). A Nevada madam, operating a lawful business in that state, could purchase a gun anywhere in America; an Arizonan convicted of engaging in the same conduct is barred from possessing guns under Section 922(g)(1), even were she to relocate her business across the Colorado River. Ariz. Rev. Stat. § 13-3208(B) (2008).

Deliberately inconsistent application of the federal ban on gun possession by felons for identical conduct occurs even within a single state. For example, "[u]nder California law, certain offenses may be classified as either felonies or misdemeanors. These crimes are known as 'wobblers.'" *Ewing* v. *California*, 538 U.S. 11, 16 (2003); *see* Cal. Penal Code § 17(b) (2008). The maximum term of imprisonment for a misdemeanor under California law is one year. Cal. Penal Code § 19.2. Accordingly, "wobbler" convictions classified as felonies are predicate offenses under Section 922(g)(1), but identical "wobbler" convictions classified as misdemeanors are not. Section 921(a)(20)(B). The application of federal law often turns on such inconsistent applications of state law to yield inconsistent results within the same state. *See, e.g. Garcia-Lopez* v. *Ashcroft*, 334 F.3d 840, 845 (9th Cir. 2003) (alien not deportable under federal law where California wobbler status is misdemeanor).

That states retain flexibility to determine whether identical conduct within their borders carries with it felony or misdemeanor consequences, including such consequences under the Gun Control

Act, is confirmed in Section 921(a)(20)(B)'s instruction that each state retains the right to restore federal gun rights to prohibited persons by virtue of pardon, expungement, or civil rights restoration. Notably, Section 921(a)(33)(B)(ii) reserves identical autonomy to the states with respect to crimes of domestic violence, acknowledging a role for state officials in determining whether domestic violence misdemeanants may continue to possess firearms.

The state's flexibility in determining application of the Gun Control Act extends to Section 922(q)(2)'s prohibition on carrying a gun within a school zone. "The term 'school' means a school which provides elementary or secondary education, *as determined under State law.*" Section 921(a)(26) (emphasis added).

The prohibitions of gun possession by drug users and mental incompetents likewise depend on differing state laws. Section 922(g)(3), barring gun possession by any person who is "an unlawful user of or addicted to any controlled substance," provides a federal definition of the latter category, but is silent as to the meaning of "unlawful user." *Cf. United States* v. *Bennett*, 329 F.3d 769, 776 (10th Cir. 2003) ("unlawful user" and "addicted" to be read disjunctively). Presumably, the lawfulness of "use" of controlled drugs is a question of state law.[4] Section

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[4] Lawful use under state law may not provide a defense to federal drug violations, *United States* v. *Oakland Cannabis*

(Continued on following page)

922(g)(4)'s prohibition requires an "adjudication" or "commitment" relating to mental illness – actions undertaken primarily by state courts, which presumably employ varying approaches to mental health issues.

In sum, Congress's consistent approach under the Gun Control Act is to prohibit certain classes of dangerous or untrustworthy people from having firearms, but in many instances to leave determination of whether an individual qualifies as a prohibited person up to state law, even where doing so would cause inconsistent results among the states or within a state. Even some federally-prohibited conduct, such as that proscribed by Section 922(q), may also be defined differently from state to state.

If Congress wished to broadly prohibit all individuals who have committed an act of domestic violence from possessing guns, it would have done so directly. The Government could then proceed to prosecute Respondent in the manner it suggests, by proving the prior act of domestic violence within its prosecution on a charge of unlawful firearm possession by a person who has engaged in domestic violence.

But that is not the choice made by Congress in enacting Section 922(g)(9). Congress knows how to

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Buyers' Coop., 532 U.S. 483 (2001), but federal law generally does not reach individual drug *use* per se, focusing instead on the manufacture and distribution of drugs in interstate commerce.

directly regulate firearms possession by individuals disqualified from firearm possession in some way, without requiring prior adjudication of the disqualifying condition. *Compare* Sections 922(g)(1) ("has been convicted in any court"), 922(g)(4) ("has been adjudicated" or "has been committed"), 922(g)(8) ("is subject to a court order"), 922(g)(9) ("has been convicted in any court") *with* 922(g)(2) ("is a fugitive from justice"), 922(g)(3) ("is an unlawful user of or addicted"), 922(g)(5)(A) ("is illegally or unlawfully in the United States").

Like its analogs in Section 922(g)(1), (3) and (4), Section 922(g)(9) operates only against individuals previously subjected to adjudicative process. When that process is left to the states, state law controls whether an individual is a felon or misdemeanant, whether an individual's drug use is lawful, whether an individual is mentally fit – and with respect to Section 922(g)(9), whether an individual committed an act of domestic violence.

The Government complains that the Fourth Circuit's decision "undermines the consistent application of federal law." Pet. Br. 27. But the true anomaly would be to hold that Section 922(g)(9) operates as an island of nationalized criminal law amongst a sea of federalism-based deference to the states in determining fitness for firearm possession.

B. Congress's Choice to Base Section 922(g)(9) Prohibition on State Law Is Consistent with Constitutional Limits on Federal Power.

The Government would ignore Section 921(a)(33)'s requirement that a domestic relationship be an element of the predicate misdemeanor offense because not all states define such offenses, and "[n]o distinctly federal misdemeanor has, as an element, a domestic relationship between the offender and the victim." Pet. Br. 9.

But the Constitution's federalist structure is not an irrationality for Congress to override. Nor are differences among the states' approaches to the suppression of crime "loopholes" for the Congress to close as it sees fit. Lautenberg Br. 10.[5]

The assumption that there must be national, uniform standards in the definition and enforcement of basic criminal laws is foreign to the federalist structure of the United States. *Cf. Printz* v. *United States*, 521 U.S. 898 (1997) (Congress cannot conscript

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[5] The concept of a "loophole" depends upon one's perspective. The absence of a criminal prohibition may be a "loophole" from the standpoint of a prosecutor wishing to bring charges. But from an individual's perspective, the existence of a particular criminal prohibition may be a "loophole" through which an indictment reaches otherwise lawful or, at least, less sanctionable conduct. Our legal system proceeds on the assumption that people are generally free to engage in conduct that is not criminally proscribed, and not the other way around.

state officials to implement federal gun laws); *New York* v. *United States*, 505 U.S. 144 (1992) (Congress cannot commandeer sovereign state functions). Indeed, this assumption is expressly disavowed by Section 927. Where "under the Government's broader reading, the statute would mark a major inroad into a domain traditionally left to the States," this Court has "refuse[d] to adopt the broad reading in the absence of a clearer direction from Congress." *United States* v. *Bass*, 404 U.S. 336, 339 (1971).

The absence of a distinctly federal domestic violence misdemeanor flows from the absence of any constitutionally enumerated federal police power reaching domestic relationships.[6] "Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution." *United States* v. *Morrison*, 529 U.S. 598, 607 (2000). But "[t]he Constitution . . . withholds from Congress a

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[6] Congress has utilized its power "[t]o exercise exclusive Legislation in all Cases whatsoever" over the District of Columbia, U.S. Const. art. I, sec. 8, cl. 17, to enact D.C. Code § 16-1001 (2008), classifying certain criminal offenses as "intrafamily offenses." Pub. Law 91-358 (July 29, 1970), 84 Stat. 546. However, Congress has not seen fit to legislate for the District a distinct misdemeanor offense that has, as an element of proof, a domestic relationship between perpetrator and victim. Congress's failure to enact such a law in the one part of the nation where it possesses the greatest power to do so belies the claims that such a uniform national standard, however desirable, was intended.

plenary police power." *Id.*, at 618 (quoting *United States* v. *Lopez*, 514 U.S. 549, 566 (1995)). "It is clear, that Congress cannot punish felonies generally." *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 428 (1821).

It is equally clear that each state retains great latitude in enacting its criminal laws. The legislative history cited by amici Senators is therefore of limited use. Senator Lautenberg looks to his statement decrying the states' "outdated laws or thinking," and plea bargain practices, to advance his reading of Section 922(g)(9) as compensating for an approach to the states' administration of criminal justice that he found deficient. Lautenberg Br. 10. Senator Feinstein likewise invokes her condemnation of "outdated or ineffective laws [that] often treat domestic violence as a lesser offense." *Id.*, at 11 (citation omitted).

To be sure, Congress might pursue policy goals within its legislative sphere regardless of contrary or inconsistent state practices it deems ineffective or based on "outdated thinking." But "we will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction." *Bass*, 404 U.S. at 349. The legislative text strongly suggests Congress deferred to the states in defining and prosecuting domestic violence offenses. That construction is more consistent with the Constitution's federalist structure than are isolated floor statements decrying the states' manner of exercising their sovereign functions.

II. THE FOURTH CIRCUIT'S DECISION IS CONSISTENT WITH THIS COURT'S "CATEGORICAL APPROACH" TO THE APPLICATION OF PRIOR CONVICTIONS.

In a string of recent decisions, this Court has adopted a "categorical approach" to the interpretation of prior convictions for purposes of applying Section 924(e), the Armed Career Criminal Act. This Act, included within the same statutory scheme as the Lautenberg Amendment, functions in much the same way. The two provisions should be read in pari materia. The "categorical approach" to Section 924(e) all but forecloses the Government's proposed application of Section 921(a)(33).

Upon a finding that a felon in possession of a firearm has a certain criminal history, Section 924(e) visits upon him significant sentencing enhancements. One type of predicate offense is a "violent felony" as specifically listed in Section 924(e)(2)(B)(ii), or an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another." Section 924(e)(2)(B)(i).

In *Taylor* v. *United States*, 495 U.S. 575 (1990), this Court considered the question of whether a sentencing court applying Section 924(e) "must look only to the statutory definitions of the prior offenses, or whether the court may consider other evidence concerning the defendant's prior crimes." *Taylor*, 495 U.S. at 600. This Court soundly rejected the latter

form of analysis, and adopted the more limited "categorical" approach. The Court held Section 924(e) "generally requires the trial court to look only to the fact of conviction and the statutory definition of the prior offense." *Taylor*, 495 U.S. at 602 (footnote omitted).

Refining the categorical approach, this Court instructed that

> a later court determining the character of an admitted burglary is generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.

Shepard v. *United States*, 544 U.S. 13, 16 (2005). This Court specifically barred consideration of "police reports or complaint applications to determine whether an earlier guilty plea necessarily admitted, and supported a conviction for, generic burglary." *Id.*

Under the categorical approach, "we consider whether *the elements of the offense* are of the type that would justify its inclusion within [Section 924(e)], without inquiring into the specific conduct of this particular offender." *James* v. *United States*, 127 S. Ct. 1586, 1594 (2007) (emphasis in original).

> In determining whether this crime is a violent felony, we consider the offense generically, that is to say, we examine it in terms of how the law defines the offense and not in

> terms of how an individual offender might have committed it on a particular occasion.

Begay v. *United States*, 128 S. Ct. 1581, 1584 (2008) (citation omitted). As explained in *Taylor*, the categorical approach is based in part on Section 924(e)'s reference to convictions, rather than to the fact that a person has committed certain crimes. *Taylor*, 495 U.S. at 600. This Court also noted that "[t]he practical difficulties and potential unfairness of a factual approach are daunting." *Id.*, at 601.

In *Begay*, this Court demonstrated the limits of the "categorical approach" in rejecting the notion that New Mexico's law prohibiting driving under the influence is a "violent felony" for purposes of Section 924(e). This Court accepted "as a given" that the DUI offense was not a "violent felony," because "DUI, as New Mexico defines it, nowhere 'has as an element the use, attempted use, or threatened use of physical force against the person of another'" as required by Section 924(e)(2)(B)(i). *Begay*, 128 S. Ct. at 1584.[7]

The Government recognizes that the "categorical approach" is at least instructive in interpreting Section 921(a)(33). In determining whether a conviction

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[7] Allowing that "[d]runk driving is an extremely dangerous crime," *Begay*, 128 S. Ct. at 1584, this Court nonetheless found DUI to be qualitatively too different from Section 924(e)(2)(B)(ii)'s enumerated violent felonies to fall into the statute's catch-all provision for crimes "present[ing] a serious potential risk of physical injury to another."

qualifies as a predicate offense under the Lautenberg Amendment, "[o]ne must determine what the convicting court found, not what the defendant did." *When a Prior Conviction Qualifies as a "Misdemeanor Crime of Domestic Violence,"* 31 Op. Off. Legal Counsel 1, 2 (2007). Notably, in seeking OLC's opinion, BATFE did not ask about, and thus OLC did not address, the domestic relationship requirement. *Id.*, at 2 n.1.

III. PUBLIC POLICY SUPPORTS THE FOURTH CIRCUIT'S CONSTRUCTION OF SECTION 922(g)(9).

The Fourth Circuit's opinion is not merely correct in terms of statutory construction. It is also more consistent with good public policy – including recognition of domestic violence offenses as more significant than ordinary misdemeanor assaults and thus warranting specific legislative attention.

Blurring the distinction between simple and domestic violence assault offenses would remove Section 922(g)(9)'s incentive to enact and enforce domestic violence offenses. Moreover, if criminal defendants learn that misdemeanor assault convictions could, years later, be interpreted as domestic violence offenses rendering them federal felons on the basis of gun possession, prosecutors might find it considerably more difficult to elicit plea bargains for assault. Serious assault cases might be bargained down to even less severe offenses, such as disturbing the peace or disorderly conduct, lest prosecutors be

forced to try cases that otherwise would not merit the expenditure of scarce prosecutorial resources.

There is a "sentence first – verdict afterwards" aspect to amicus NNED's plea that affirming the Fourth Circuit "would put the federal misdemeanor firearm ban at the mercy of the vagaries of prosecutorial discretion." NNED Br. 19. The imposition of criminal disabilities must always be withheld in the absence of an appropriate conviction. It is not too much to ask that before depriving an individual of a fundamental constitutional right, the individual first be duly charged with and convicted of committing the requisite offense.[8]

Prosecutorial discretion is an indispensable feature of our criminal justice system. Prosecutors are expected to use their best judgment to balance the likelihood, ease, and merit of obtaining a conviction against the severity of the conduct in each particular case. Prosecutorial discretion play a valuable role in the domestic violence arena, where the facts, credibility, and motivations of the various participants can be

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[8] Accordingly, it is not obvious that affirming the Fourth Circuit would lead to the purging of "thousands of convicted domestic batterers" from the National Instant Check System database, Brady Br. 35, since these individuals were by definition not convicted of domestic violence and may not have even been convicted of battery. Removing people from the list of prohibited firearms buyers is perfectly appropriate where, by law, their names should never have appeared on the list in the first place. *See* Section 925A.

hazy.[9] Many cases of domestic violence are obvious. But not every individual accused of domestic violence is a fortiori guilty. A prosecutor unwilling to pursue serious charges against a criminal defendant might well have good and sufficient reasons for holding back.

Prosecutors who are too lax in their approach to crime can be, and are, replaced by the impacted voters. And if prosecutors lack sufficient tools with which to fight crime, it is the primary role of state and local legislatures – not Congress – to remedy the situation. It is not the role of Congress to legislate severe federal penalties as compensation for a permissive attitude toward domestic violence allegedly prevalent among the nation's prosecutors. If Congress truly intended to second-guess or dispense entirely with the judgments of local prosecutors in particular cases, such intent was improper.

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[9] One need only look to the facts of the Fifth Circuit's landmark opinion in *United States* v. *Emerson*, 270 F.3d 203 (5th Cir. 2001) to recall that allegations of domestic violence may be easier to make than to prove. The Fifth Circuit held the Second Amendment did not bar Emerson's prosecution under Section 922(g)(8) for possessing a gun while subject to a restraining order. But Emerson was acquitted of the underlying charge of domestic violence. *Emerson*, 270 F.3d at 264 n.66.

IV. THE GOVERNMENT BEARS THE BURDEN OF PROVING SECOND AMENDMENT RIGHTS HAVE BEEN VOLUNTARILY, KNOWINGLY AND INTELLIGENTLY WAIVED.

The Second Amendment is no obstacle to the disarmament of dangerous, violent individuals. Indeed, Second Amendment rights are based largely upon the inherent right of law-abiding individuals to defend themselves from violent crime. The right to keep and bear arms would be self-defeating were it retained by violent criminals.[10]

However, an individual admitting criminal guilt must ordinarily be made aware of the consequences of such an admission. "We should indulge every reasonable presumption against waiver of fundamental

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[10] Amicus does not agree that domestic violence convictions might not warrant disarmament because these crimes are classified as misdemeanors. Resp. Br. 51. In determining whether an individual should be disarmed, the key question should be whether the individual is dangerous. The formalistic distinction between misdemeanors and felonies may not always serve the interests of society or of individuals when used to determine firearms disabilities.

In proposing a remand to consider Section 922(g)(9)'s constitutionality, Respondent cites but does not actually endorse the "heightened scrutiny" standard of review recently advanced by the Government for resolution of Second Amendment claims. Resp. Br. 51-52. Although amicus curiae believes Section 922(g)(9) would survive Second Amendment scrutiny as applied to individuals convicted of violent crimes, the test to be applied must be more robust than the mere "heightened" scrutiny proposed by the Government. *District of Columbia* v. *Heller*, 128 S. Ct. 2783, 2817 n.27 (2008).

constitutional rights. For that reason, it is the State that has the burden of establishing a valid waiver. Doubts must be resolved in favor of protecting the constitutional claim." *Michigan* v. *Jackson*, 475 U.S. 625, 633 (1986) (citations omitted). To establish that a constitutional right has been waived, the Government must prove "an intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938).

"Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial," including the Fifth Amendment right against self-incrimination, and the Sixth Amendment jury trial and confrontation rights. *Boykin* v. *Alabama*, 395 U.S. 238, 243 (1969). "We cannot presume a waiver of these three important federal rights from a silent record." *Id.*

To these fundamental rights waived by guilty plea, Section 922(g)(9) adds another: the Second Amendment right to keep and bear arms. But as with other valuable civil rights, relinquishment of Second Amendment rights cannot be made unknowingly. Where the consequences of pleading guilty include the loss of Second Amendment rights, the accused should be advised as much so that he or she may make an informed decision in agreeing to the plea.

A waiver of fundamental rights is valid if the defendant "knows what he is doing and his choice is made with eyes open." *Iowa* v. *Tovar*, 541 U.S. 77, 88 (2004) (quoting *Adams* v. *United States ex rel.*

McCann, 317 U.S. 269, 279 (1942)). To conclude that a fundamental right has been waived, courts must make two findings:

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.

Moran v. *Burbine*, 475 U.S. 412, 421 (1986). "Events occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right." *Id.*, at 422.

In *Schneckloth* v. *Bustamante*, 412 U.S. 218 (1973), this Court sought to distinguish between the waiver of constitutional rights in the context of a criminal trial, to which it would continue to apply the stricter "knowing and intentional" standard, and the waiver of constitutional rights in other contexts, which might be valid provided they met a lower standard of voluntariness. *Id.*, at 237.

Schneckloth rejected the claim that a knowing and intelligent waiver of Fourth Amendment rights is necessary in consenting to a search. This Court nonetheless reaffirmed that "when a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent

was, in fact, freely and voluntarily given." *Schneckloth*, 412 U.S. at 222 (citations omitted). But the waiver proposition is poorly framed in this context. A person who consents to a search is not thereby waiving his Fourth Amendment rights, rather, he merely renders the search reasonable within the Fourth Amendment's requirements. *See Samson* v. *California*, 547 U.S. 843, 852 n.3 (2006); *United States* v. *Knights*, 534 U.S. 112, 118-19 (2001).

The distinction between Fourth Amendment waiver or consent, and the waiver of other rights, is based upon the context in which such rights might be invoked or lost:

> The circumstances that prompt the initial request to search may develop quickly or be a logical extension of investigative police questioning. The police may seek to investigate further suspicious circumstances or to follow up leads developed in questioning persons at the scene of a crime. These situations are a far cry from the structured atmosphere of a trial where, assisted by counsel if he chooses, a defendant is informed of his trial rights.

Schneckloth, 412 U.S. at 232.

It would be anomalous to hold that the waiver of Fifth and Sixth Amendment rights "in the context of the safeguards of a fair criminal trial," *id.*, at 235, be found only upon the stricter standard of a "knowing and intelligent waiver," while in the same breath the accused can be deemed to have permanently waived

his Second Amendment rights under the more relaxed standard of voluntariness.[11]

The governmental interest in obtaining a waiver of Second Amendment rights is co-extensive with its interest in obtaining a waiver of Fifth and Sixth Amendment trial rights. No exigencies warrant that the accused be rushed into making an uninformed decision. Indeed, a conviction cannot qualify as a predicate domestic violence offense unless the accused was either represented by counsel or "knowingly and intelligently waived" his Sixth Amendment rights. Section 921(a)(33)(B)(i)(I). Jury rights, where available, must also have been waived in a knowing and intelligent fashion in order for the conviction to be considered a predicate domestic violence offense. Section 921(a)(33)(B)(i)(II)(bb). Congress would apparently not impose the domestic violence gun disability upon individuals not fully aware of their rights.

But while the Government has no valid interest in depriving defendants of information about the consequences of their pleas, the loss of Second Amendment rights under Section 922(g)(9) may be the most, perhaps the only, severe consequence facing an accused in pleading guilty. That much is plainly demonstrated by the facts of this case. Respondent's

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[11] To be sure, however, the relinquishment of Second Amendment rights in this case would fail even the less-stringent voluntariness test, as the disqualifying statute had not been enacted at the time the plea was entered and could not have been contemplated by Respondent.

initial plea of guilty to misdemeanor assault cost him a term of probation, whereas contesting the prosecution would have risked more significant criminal penalties on a fact finder's unpredictable assessment of witness testimony. Respondent might have made the same decision were he informed that pleading guilty would permanently cost him his Second Amendment rights. But "[w]e do not presume acquiescence in the loss of fundamental rights." *Ohio Bell Tel. Co.* v. *Public Utilities Comm'n*, 301 U.S. 292, 307 (1937).

CONCLUSION

Section 922(g)(9) is consistent with other provisions of the federal Gun Control Act predicating firearms disabilities on state court adjudication, and thus assuming disparate results among and even within the states. The accepted "categorical approach" to application of predicate convictions likewise indicates the Fourth Circuit reached the correct conclusion in this case.

Requiring that the domestic violence disqualification attach only to convictions where a domestic relationship was an element of proof serves the important public policies of encouraging states to enact laws targeting domestic violence, while preserving the prosecutorial discretion necessary to the fair and efficient administration of criminal justice.

Finally, the Second Amendment does not stand in the way of Congress disarming violent criminals, including dangerous domestic abusers. But when an individual prepares to admit guilt to a crime, the conviction of which would cause a loss of Second Amendment rights, courts should enquire whether the accused has made a voluntary, knowing and intelligent waiver of *all* fundamental constitutional rights at stake – including Second Amendment rights.

For the foregoing reasons, amicus curiae SAF respectfully requests that the opinion below be affirmed.

Respectfully submitted,

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